Supreme Court, U.S.
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No. 05-___

IN THE

Supreme Court of the United States

Peabody Western Coal Company and
Peabody Coal Company, LLC,
Petitioners,

v.

Equal Employment Opportunity Commission.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a plaintiff may join as an involuntary defendant under Federal Rule of Civil Procedure 19 a party which the plaintiff is prohibited from suing directly.

RULE 29.6 STATEMENT

Petitioner Peabody Western Coal Company is a wholly owned subsidiary of Peabody Holding Company, Inc. Petitioner Peabody Coal Company, LLC, is wholly owned by Interior Holdings, LLC, which is wholly owned by Eastern Coal Company, LLC, which is wholly owned by Peabody Holding Company, Inc. Peabody Holding Company, Inc., in turn, is wholly owned by Peabody Investments Corp., which is wholly owned by Peabody Energy Corporation, a publicly held company.

PARTIES TO THE PROCEEDING BELOW

Petitioner Peabody Western Coal Company appeared in the court below but in some instances was erroneously designated as Peabody Coal Company. For avoidance of doubt, both companies are named as petitioners in this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Peabody Western Coal Company and Peabody Coal Company, LLC, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

OPINIONS BELOW

The opinion of the Ninth Circuit (Pet. App. 1a-18a) is published at 400 F.3d 774. The opinion of the district court (*id.* 19a-48a) is published at 214 F.R.D. 549.

JURISDICTION

The court of appeals denied rehearing and rehearing en banc on May 18, 2005. See Pet. App. 49a. On August 3, Justice O'Connor extended the time to file this petition to and including September 15, 2005. App. 05A122. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS AND RULE

Title VII of the Civil Rights Act of 1964, provides, in relevant part:

> It shall be an unlawful employment practice for an employer * * * to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. 2000e-2(a)(1).

42 U.S.C. 2000e(b) provides, in relevant part, that for purposes of Title VII, "[t]he term 'employer' * * * does not include (1) * * * an Indian tribe."

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[1] Because the real party in interest is petitioner Peabody Western Coal Company, hereinafter we use the singular "petitioner."

42 U.S.C. 2000e-2(i) provides:

> Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

42 U.S.C. 2000e-5(f)(1) provides, in relevant part:

> In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court.

Federal Rule of Civil Procedure 19 provides, in relevant part:

> (a) Persons to be Joined if Feasible. A person * * * whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if * * * the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may * * * leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.
>
> (b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the

parties before it, or should be dismissed, the absent person being thus regarded as indispensable.

STATEMENT OF THE CASE

By statute, Congress has provided that suits by the federal government against Indian tribes under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, must be filed by the Department of Justice rather than the Equal Employment Opportunity Commission (EEOC). 42 U.S.C. 2000e-5(f)(1), 2000e-6. The Ninth Circuit in this case, however, permitted the EEOC to circumvent this statutory restriction merely by suing a third party and then "joining" a tribe as a defendant. The court of appeals recognized that its ruling conflicts with the holding of two other circuits that Rule 19 does not provide parties with an avenue for evading limitations on their right to bring a direct suit against a defendant.

1. Title VII prohibits, *inter alia*, discrimination on the basis of national origin in certain employment relationships. 42 U.S.C. 2000e-2(a) to -2(d). Respondent EEOC construes that prohibition to include discrimination in favor of members of an Indian tribe. See *Dawavendewa* v. *Salt River Agr. Imp. & Power Dist.*, 154 F.3d 1117, 1121 (CA9 1998). Congress, however, made a special exception for certain employment preferences for Indians living on or near a reservation:

> Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which preferential treatment is given to any individual because he is an Indian living on or near a reservation.

42 U.S.C. 2000e-2(i). The EEOC interprets this exception narrowly to permit preferences for Indians generally, but not preferences for members of the particular Indian tribe on or

near whose reservation the business operates. *Dawavendewa*, 154 F.3d at 1121.

On the EEOC's reading of Title VII, the statute renders invalid provisions in mining leases promulgated and subsequently re-approved by the Department of the Interior. The leases, which are entered into between tribes and mining companies, call for the mining companies to employ a hiring preference for members of the tribe in question. See Pet. App. 2a-4a; *id.* 30a. The EEOC's position also invalidates statutes enacted by numerous Indian tribes including the Navajo Nation (Nation), which is the country's largest federally recognized tribe.[2] To "protect the health, safety, and welfare of Navajo workers," 15 Navajo Nation Code 602(a)(6), quoted in *Ariz. Pub. Serv. Co.* v. *Aspaas*, 77 F.3d 1128, 131 (CA9 1995), the Nation has adopted the Navajo Preference in Employment Act (NPEA), which requires "[a]ll employers doing business within the territorial jurisdiction of the Navajo Nation, or engaged in any contract with the Navajo Nation" to "[g]ive preference in employment to Navajos," 15 Navajo Nation Code 604, quoted in Pet. App. 30a.

The EEOC cannot, however, sue Indian tribes under Title VII. Although Congress generally empowered the EEOC to enforce Title VII through suits in federal court, see *id.* § 2000e-5(f)(1), it specifically exempted from that authority claims against any "government, governmental agency, or political subdivision," *ibid.* See also 42 U.S.C. 2000e-5(f)(2), 2000e-8(c). Such suits must be brought not by the EEOC but instead by the Department of Justice. *Ibid.* The EEOC acknowledges that this provision vests the authority to sue Indian tribes in the Department of Justice. See Pet. App. 35a. In addition, neither the EEOC nor the Department of Justice may sue a tribe in its capacity as an employer because

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[2] The Nation has over a quarter-million enrolled members and reservation lands covering 27,000 square miles in Arizona, Utah, and New Mexico.

Congress exempted Indian tribes from the definition of covered "employers" under Title VII. 42 U.S.C. 2000e(b).

2. Petitioner Peabody Western Coal Company (PWCC) mines coal within the Nation's territorial jurisdiction. In hiring employees for those mining operations, it is, for two reasons, required to give preference to members of the Nation. First, the preference is embodied in the leases – prepared and approved by the Department of the Interior – between petitioner and the Nation that govern petitioner's mining operations. See Pet. App. 30a, 2a. The leases were amended and re-approved in 1987 and 1999, with no changes to the preference provisions. *Id.* 29a. Either the Nation or the Department of Interior may cancel the leases for a violation of their terms. *Id.* 3a. Second, petitioner is subject to the NPEA with respect to its mining operations within the territory of the Nation.

In 2001, respondent EEOC initiated this action by suing PWCC's parent company, petitioner Peabody Coal Company, under Title VII. The complaint rests on the EEOC's view that an employment preference in favor of members of one particular tribe constitutes prohibited national-origin discrimination and that the exception created by 42 U.S.C. 2000e-2(i) does not permit a business to provide employment preferences to members of the tribe on whose reservation it operates. The EEOC specifically alleged that petitioner, in compliance with the terms of the leases, "has a history of refusing to hire non-Navajo Native Americans for open positions at its mine," in violation of Title VII. Compl. 3.

The EEOC sought an order requiring petitioner to pay back pay and compensatory and punitive damages to a "class" of non-Navajo Native Americans. Compl. 4. The EEOC also sought "a permanent injunction" against "Peabody, its officers, successors, assigns, and all persons in active concert or participation with it." *Ibid.* EEOC has never suggested that the suit was authorized by the Department of Justice, which did not sign the complaint. See *id.* at 5.

Petitioner sought to dismiss the EEOC's complaint, explaining that it was nothing more than a thinly veiled suit against the Nation that the EEOC was prohibited from bringing directly. In response, the EEOC moved to join the Nation as a defendant under Federal Rule of Civil Procedure 19. The EEOC specifically requested that the district court "order the Navajo Nation to appear and defend any interests it believes may be affected by this litigation." Pet. App. 34a. As the district court recognized, those interests are substantial, for the EEOC "characterizes [its] lawsuit as litigation over 'the validity of its [the Navajo Nation's] discriminatory lease provision and employment preference provisions * * * [and] the interplay between its tribal sovereignty and Title VII.'" *Ibid.* (quoting EEOC's Opposition to Dismissal 4).

The district court held that the EEOC could not employ the joinder provisions of the Federal Rules of Civil Procedure to avoid the statutory prohibition that precluded it from suing the Nation directly. Not only are tribes "specifically exempt as employers from the requirements of Title VII," Pet. App. 37a (citing 42 U.S.C. 2000e(b)), but "[t]he Attorney General clearly has exclusive authority to file suit whenever a government such as an Indian tribe is involved," *ibid.* (citing 42 U.S.C. 2000e-5(f)(1), (2); *id.* § 2000e-8(c)). The district court found persuasive decisions of other federal courts rejecting similar attempts by the EEOC to invoke "joinder" to circumvent the prohibition on suits against a governmental entity imposed on it by statute. *Id.* 36a-37a (citing cases). The district court explained:

> The EEOC in effect is seeking to sue the Navajo Nation to force it to defend the Navajo Preference in Employment Act and its contracts with employers working on its lands, when it is prohibited from suing the Navajo Nation to enforce Title VII provisions against the tribe directly. This is contrary to the clear provisions of Title VII prohibiting the

> EEOC from suing governments, and specifically exempting the Indian tribes from its provisions.

Id. 37a-38a. Indeed, under these provisions, "joinder of an Indian tribe under Rule 19 would divest the EEOC of its authority to litigate." *Id.* 39a.

The district court further concluded that the Nation was an indispensable party to the suit, such that the EEOC's complaint must be dismissed because the Nation could not be joined. In particular, the absence of the Nation as a party would prejudice its own sovereign interests and the interests of the tribal members it represents. Pet. App. 40a. The court accordingly denied the EEOC's motion to join the Nation and dismissed the complaint. *Id.* 41a.

3. On the EEOC's appeal, the Ninth Circuit reversed. The court of appeals characterized the suit as, fundamentally, a challenge to the provisions of the leases between petitioner and the Nation that had been issued and approved by the Department of Interior to "require[e] that preference in employment be given to members of the Navajo Nation." Pet. App. 2a. The court of appeals did not doubt the district court's conclusion that, with respect to such a claim, "the EEOC cannot directly sue the Nation." *Id.* 5a. Rather, it held that so long as the EEOC does not seek affirmative relief from the Nation, "joinder * * * is not prevented by the fact that the EEOC cannot state a cause of action against [the Nation]." *Id.* 6a.

The Ninth Circuit reasoned in two stages. First, it agreed with the district court and the parties "that the Navajo Nation is a necessary party under Rule 19(a)(1)." Pet. App. 9a. It recognized that "the Nation is a signatory to lease provisions that the [EEOC] challenges under Title VII." *Ibid.* The court of appeals accordingly deemed the Nation an indispensable party under the settled rule that "tribes are necessary parties to actions that might have the result of directly undermining authority they would otherwise exercise." *Ibid.*

Second, the Ninth Circuit nonetheless rejected the district court's conclusion that the Nation could not feasibly be joined to the suit under Rule 19. The court of appeals did not doubt that, through the provisions exempting tribes from the definition of "employer" and providing that only the Department of Justice could sue a government, Congress had prohibited the EEOC from suing the Nation under Title VII. Pet. App. 10a-11a. But it held that the case was controlled by the circuit's prior construction of the Rules of Civil Procedure as providing that "a plaintiff's inability to state a direct cause of action against an absentee does not prevent the absentee's joinder under Rule 19." *Id.* 11a (citing *National Wildlife Fed'n* v. *Espy*, 45 F.3d 1337, 1344-45 (1995); *Beverly Hills Sav. & Loan Ass'n* v. *Webb*, 406 F.2d 1275, 1279-80 (1969)).

The court of appeals explained that its ruling was consistent with decisions of the First, Sixth, and Tenth Circuits. Pet. App. 11a (citing *Sierra Club* v. *Hodel*, 848 F.2d 1068, 1077 (CA10 1988)); *id.* 14a (citing *EEOC* v. *Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 52 (CA1 2002); *EEOC* v. *MacMillan Bloedel*, 503 F.2d 1086, 1088 (CA6 1974)). But it acknowledged the contrary holding of the D.C. and Fifth Circuits – with which the Ninth Circuit "has never agreed" (*id.* 12a) – that "it is implicit in Rule 19(a) itself that before a party * * * will be joined as a defendant the plaintiff must have a cause of action against it." *Vieux Carre Prop. Owners* v. *Brown*, 875 F.2d 453, 457 (CA5 1989). See also *Davenport* v. *Int'l Bhd. of Teamsters, AFL-CIO*, 166 F.3d 356, 366 (CADC 1999) (adopting *Vieux Carre*). The Ninth Circuit also thought that those rulings might be distinguishable on the ground that in those cases the plaintiffs had directly sought injunctive relief as against the joined party. Pet. App. 12a-13a. Here, by contrast, "[j]oinder is necessary for the 'sole purpose' of effecting complete relief between the parties by ensuring that both Peabody and the Nation are bound to any judgment upholding or striking down

the challenged lease provision." *Id.* 13a-14a (citation omitted).[3]

5. The Ninth Circuit denied rehearing and rehearing en banc. Pet. App. 49a. This petition followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve a recurring circuit conflict over the proper construction of a basic rule of civil procedure and to reinstate the careful balance Congress established between the powers of the EEOC and the sovereign interests of government entities such as the Navajo Nation.

I. The Ninth Circuit's Holding That A Party May Be Joined To A Suit Notwithstanding That No Claim May Be Stated Against The Joined Party Is The Subject Of A Square Circuit Conflict.

This Court's intervention is required to resolve an important division among the federal courts regarding the proper application and limits of Federal Rule of Civil Procedure 19.

A. The Ninth Circuit's Decision Conflicts With Precedent From Other Circuits On The Proper Scope Of Rule 19.

The Ninth Circuit in this case relied on that court's settled precedent to hold that a party may be joined to an action under Rule 19 even when no claim may be stated against it and even if Congress has explicitly precluded the plaintiff from suing the absent party directly. Pet. App. 14a (citing also *EEOC* v. *Union Independiente de la Autoridad de*

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[3] The court of appeals separately rejected the district court's holding that the EEOC's suit was barred because it presented a nonjusticiable "political question," Pet. App. 17a, and reinstated the EEOC's unrelated challenge to certain recordkeeping by petitioner, *id.* 18a. Those holdings are not at issue in this petition.

Acueductos y Alcantarillados de Puerto Rico, 279 F.3d 49, 52 (CA1 2002); *Sierra Club* v. *Hodel*, 848 F.2d 1068 (CA10 1988); *EEOC* v. *MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (CA6 1974)).

As the court of appeals recognized, the Fifth and D.C. Circuits disagree. In *Vieux Carre Property Owners* v. *Brown*, 875 F.2d 453, 457 (CA5 1989), a community group in New Orleans sought to block private parties and a local government from undertaking an aquarium and park project. The group's theory was that, under the federal Rivers and Harbors Act (RHA), the project first required clearance from the Army Corps of Engineers (Corps). The group sued both the developers and the Corps.

The Fifth Circuit recognized that Congress had provided the Administrative Procedure Act "as a route through which private plaintiffs can obtain federal court review of the decisions of federal agencies," alleged to be in violation of the RHA. 875 F.2d at 456. But the APA provided no such mechanism for adjudicating the private parties' compliance with the RHA. *Ibid.* Moreover, the plaintiffs could not sue the private defendants directly under the RHA because this Court had held that "a private party has no implied right of action for violations of the RHA." *Ibid.* (citing *California* v. *Sierra Club*, 451 U.S. 287 (1981)).

The plaintiffs nonetheless argued that the private parties could be properly joined to their APA suit against the Corps under Rule 19 and, thereby, could be subject to an adjudication under the RHA even though Congress has precluded the plaintiffs from achieving this end directly. 875 F.2d at 456-57 (relying on *Sierra Club* v. *Hodel*, 848 F.2d 1068 (CA10 1988)). The Fifth Circuit rejected that argument for two reasons: one narrow, the other broad. First, the court held that Rule 19 could not be used to circumvent Congress's determination to authorize only the Attorney General to bring suits to enforce the RHA against developers. 875 F.2d at 457. Permitting the plaintiffs to obtain an RHA adjudication

against the developers would, the Court held, "negate[] the Supreme Court's decision in *Sierra Club*" that Congress did not intend for private enforcement of that statute. *Id.* at 457. "As long as the private plaintiff joined the federal agency in the action, the former could reach a nonagency defendant * * *." *Ibid.* Rule 19, the court concluded, could not be used to permit private plaintiffs to sue to enforce the RHA against developers when the statute "explicitly vests that authority in the Attorney General." *Ibid.* "Any other conclusion, we believe, would be too at odds with *Sierra Club*." *Id.* at 457 n.2.[4]

The Fifth Circuit also rejected the plaintiffs' Rule 19 argument on a broader ground, holding that "it is implicit in Rule 19(a) itself that * * * before [a party] will be joined as a defendant the plaintiff must have a cause of action against it." 875 F.2d at 457. Because the plaintiffs had no private right of action to enforce the RHA, they obviously lacked a cause of action against the private developer defendants. *Ibid.*

The Fifth Circuit unquestionably would reject the Ninth Circuit's ruling in this case. The Fifth Circuit held that Rule 19 joinder is prohibited if it would otherwise circumvent a statutory restriction on suing the joined party directly. In reaching that conclusion, the Fifth Circuit notably refused to

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[4] The Fifth Circuit also cited *Dunn* v. *Ca[illegible]*, 110 F.R.D. 439 (S.D. Ind. 1986), aff'd on other grounds, 808 F.2d 555 (CA7 1986), in which the plaintiffs filed suit alleging that the defendant government officials were subjecting pretrial detainees to unconstitutional prison conditions. The parties reached a consent decree under which a new correctional facility would be created and leased to the government. In response, certain taxpayers challenged the lease agreement in state court. The plaintiffs could not sue the taxpayers to preclude their suit, because the Tax Injunction Act forbids interference with such state court litigation. Not only did that statute "deprive[] the Court of jurisdiction over the [taxpayers'] state law claims," but also "therefore the [taxpayers] cannot be joined in this action." *Dunn*, 110 F.R.D. at 440.

follow the Tenth Circuit's decision in *Sierra Club* v. *Hodel*, 848 F.2d 1068 (1988), which the decision below embraces, see Pet. App. 11a-12a.

This case falls *a fortiori* within the Fifth Circuit's reasoning. Just as the Fifth Circuit relied on the fact that no right of action had been implied under the RHA, this case involves a clear prohibition on the EEOC suing the Nation. The Ninth Circuit's holding in this case also conflicts with the Fifth Circuit's broader conclusion that Rule 19 joinder is prohibited unless the plaintiff can state a claim against the joined party. Here, the EEOC is prohibited by statute from seeking even a declaratory judgment against the Nation that its law or the leases it entered with petitioner violate Title VII.[5]

As the Seventh Circuit observed in *EEOC* v. *Elgin Teachers Ass'n*, 27 F.3d 292, 293 (1994), other courts have also rejected similar attempts by the EEOC to circumvent the limits on its power to adjudicate claims against government entities. In *Elgin*, the EEOC sought to challenge a school district's pregnancy leave policies by suing the teacher's union and joining the school board under Rule 19. *EEOC* v. *Elgin Teachers Ass'n*, 658 F. Supp. 624, 625 (E.D. Ill. 1987).

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[5] The Ninth Circuit's expansive interpretation of Rule 19 is also in substantial tension with precedent of the D.C. Circuit. In *Davenport* v. *Int'l Bhd. of Teamsters, AFL-CIO*, 166 F.3d 356 (1999), the D.C. Circuit embraced the Fifth Circuit's decision in *Vieux Carre*. In *Davenport*, flight attendants sued their union alleging that it had violated the federal labor laws by entering into an interim labor agreement with an airline. The plaintiffs argued that the airline could be joined under Rule 19. The D.C. Circuit rejected that argument. It did not dispute that the airline was a "necessary party" to the suit as a signatory to the agreement with the union. *Id.* at 366. Rather, it explained in detail that the airline had not itself violated any statute, see *id.* at 361-65, and adopted the Fifth Circuit's view that "while Rule 19 provides for joinder of necessary parties, it does not create a cause of action against them," *id.* at 366.

Unlike the Ninth Circuit, the district court in that case refused to permit the EEOC to proceed indirectly against a government entity it could not sue directly. *Id.* at 624.[6] The district court in *EEOC* v. *American Federation of Teachers, Local No. 571*, 761 F. Supp. 536, 537 (N.D. Ill. 1991), likewise rejected the EEOC's attempt to litigate claims against a school board by joining the board to a suit against a teacher's union. In fact, the court found the EEOC's arguments so lacking in merit that it awarded attorney's fees to the school district, observing that the EEOC had attempted the same ploy twice before in different courts within the judicial district, each time to no avail. *Id.* at 540 (citing *Elgin*, *supra*, and *EEOC* v. *Oak Park Teachers' Ass'n*, 45 Fair Empl. Prac. Cases 446 (N.D. Ill. 1985)). If left unreviewed, the decision of the court of appeals in this case would permit the EEOC to resume these discredited tactics anew in the courts of the Ninth Circuit.

This Court's intervention is moreover required because the circuit conflict is both longstanding and intractable. The split has existed since 1989 (see *Vieux Carre*, 875 F.2d at 456-57 (rejecting Tenth Circuit's reasoning and conclusion in *Hodel*)) and – as evidenced by the Ninth Circuit's acknowledgement in this case of the contrary positions of the Fifth and D.C. Circuits, see Pet. App. 12a-13a – has only become more entrenched.

B. The Ninth Circuit's Attempt To Distinguish Contrary Precedents From Other Circuits Fails.

There is no merit to the Ninth Circuit's suggestion that the cases rejecting its construction of Rule 19 might be distinguishable on the ground that the plaintiffs there sought not only joinder but also an express injunction against the joined party. In *Vieux Carre*, the Fifth Circuit flatly concluded that *joinder* – as opposed to an *injunction* – is precluded when the plaintiff seeks to join the party in order to

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[6] The EEOC did not appeal the dismissal. 658 F. Supp. at 624.

obtain an adjudication Congress has precluded it from obtaining directly. The court did not rely in any respect on the fact that the plaintiffs also expressly sought injunctive relief. To the contrary, it explained that Rule 19 may not be used to circumvent the rule that "a private plaintiff has no right to enjoin *or sue* a nonagency defendant for damages under the RHA." *Vieux Carre*, 875 F.2d at 457 (emphasis added).[7]

Subsequent cases from within the Fifth and D.C. Circuits confirm that those circuits' precedents do not turn on the types of relief sought. See, *e.g.*, *Chavous* v. *District of Columbia Fin. Responsibility and Mgmt. Assistance Auth.*, 154 F. Supp. 2d 40 (D.D.C. 2001) (dismissing city from suit against city's control board and private hospital that sought to void contract between those parties for transfer of public hospital services; court explains that the city's "motion to dismiss the complaint against it also will be granted because the plaintiffs have alleged no cognizable claim against" the city); *Hines* v. *Grand Casinos of Louisiana, LLC*, 140 F. Supp. 2d 701, 705 (W.D. La. 2001) (in discrimination case, declining to join tribe as defendant and explaining that "implicit in Rule 19 is the requirement that the plaintiff have a viable cause of action against the party to be joined as a defendant"; here, "[e]ven if defendant were to establish that the Tribe was plaintiff's employer, plaintiff has no claim against the Tribe under Title VII").

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[7] The D.C. Circuit in *Davenport* did state that "[i]t is not enough that plaintiffs 'need' an injunction against Northwest in order to obtain full relief. They must also have a right to such an injunction, and Rule 19 cannot provide such a right." 166 F.3d at 366. But the court made that statement only after adopting the Fifth Circuit's holding that plaintiffs may sue under Rule 19 only if they can state a claim against the joined party, and the court's point was that the plaintiff must have a "right" to bring the joined party into the case, not that it was seeking an "injunction."

The purported distinction identified by the Ninth Circuit is, in any case, inapplicable here. The EEOC's complaint in this case broadly seeks an injunction against not only petitioner Peabody but also "all persons in active concert or participation with it," Compl. 4, ¶ A – language broad enough to encompass the Navajo Nation. In fact, the EEOC has expressly acknowledged that it is seeking an injunction that would prohibit the Navajo Nation from enforcing the NPEA and its leases with petitioner. Dist. Ct. Trans. 28, reprinted in SER 156 (EEOC seeks "to strike that provision from the lease and *order the Navajo Nation* [not] to enforce that lease provision against Peabody Coal" (emphasis added)). Beyond the order sought directly against the Nation, the *very point* of joining the Nation is to ensure that it is bound by a judgment in the case by res judicata, an effect no different than an injunction as a practical matter.

II. Certiorari Is Warranted In Light Of The Important Sovereign Interests At Stake In The Relationship Between Tribal Governments And The United States.

Certiorari would be warranted even in the absence of a circuit split because the decision below has a "significant impact on the relationship between Indian tribes and the Government." *United States Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001). See also *Affiliated Ute Citizens of Utah* v. *United States*, 406 U.S. 128, 141 (1972) (granting certiorari "because of the importance of the issues for [certain] Indians"); *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 424 (1943) ("We granted certiorari because the case was thought to raise important questions concerning the relations between the two tribes and the United States."); *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 230 (1985) (granting certiorari because of "the importance of the Court of Appeals' decision not only for the Oneidas, but potentially for many eastern Indian land claims").

The Ninth Circuit's decision implicates the delicate balance Congress has drawn between the interest of tribal sovereigns in avoiding suit in federal court and the power of federal agencies to enforce federal statutes. The case affects not only the relationship between the tribes and the federal government, but also the distribution of power among federal agencies themselves, a distribution that was designed to protect the interests of tribes and prevent unnecessary friction between tribes and the United States. As discussed below, the decision of the Ninth Circuit contravenes the careful balance Congress struck.

Indian Tribes have a sovereign interest in avoiding not only judgment, but also the indignity of being drawn before a federal court except when and as authorized by Congress. See *Kiowa Tribe of Oklahoma* v. *Mfg. Techs.*, 523 U.S. 751, 754 (1998) (tribes enjoy sovereign immunity to suit, absent waiver by tribe or abrogation by Congress); cf. *Federal Maritime Comm'n* v. *South Carolina State Ports Auth.*, 535 U.S. 743, 766 (2002) (sovereign immunity is an immunity from suit, not simply defense to liability). Accordingly, any delay in the resolution of the EEOC's authority to litigate claims against tribes through the device of Rule 19 joinder will not only impose substantial injury to the sovereignty interests of the nation's largest Indian tribe, but will risk similar affronts to the many other tribes that fall within the expansive jurisdiction of the Ninth Circuit. See Pet. for Cert. 27, *United States Dep't of Interior* v. *Klamath Water Users Protective Ass'n*, 530 U.S. 1304 (2000) (No. 99-1871) (urging court to grant certiorari despite lack of circuit split because "[t]he Ninth Circuit contains approximately 62% (28 million out of 45.5 million acres) of the lands held by the United States in trust for Tribes and individual Indians, and 400 of the 556 federally recognized Tribes are within that Circuit"); 530 U.S. 1304 (2000) (granting certiorari).

III. Rule 19 May Not Be Used To Circumvent Restrictions Congress Has Placed On A Party's Right To Sue An Absent Party Directly.

There is no dispute that the EEOC is prohibited from bringing an action directly against the Nation to challenge the legality of the Nation's preference requirement. See *supra* at 4. Although Congress designated the EEOC as the primary government enforcer of Title VII for most purposes, it specifically assigned authority to sue governments (including Indian tribes) to the Attorney General. 42 U.S.C. 2000e-5(f)(1). Permitting the EEOC to nonetheless obtain an adjudication against the Nation through Rule 19 joinder would impermissibly allow the Commission "to circumvent congressional intent by a mere pleading device." *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989).

A. Congress Clearly Prohibited the EEOC From Litigating Disputes With Indian Tribes.

In enacting Title VII, Congress crafted a detailed enforcement scheme under which litigation with sovereigns shall be controlled and conducted by the Attorney General, not the EEOC. Those restrictions apply whether the litigation is conducted directly through a suit against the Tribe or indirectly through a suit in which the Tribe is joined as an involuntary defendant.

1. Plain Language of Title VII

The EEOC's actions in this case are, for all practical purposes, indistinguishable from filing a suit for a declaratory judgment against the Nation directly. Whether it sues the Nation directly or joins it under Rule 19, both the purpose and the effect of the EEOC's suit are to haul the Nation before a federal court to obtain a binding adjudication of the legality of the Nation's preference requirement. Indeed, the EEOC admitted as much below. See *supra* at 6.

But the plain language of Title VII prohibits the EEOC from seeking to resolve Title VII disputes with Indian tribes

in court. Section 2000e-5(f)(1) commands that if the EEOC is unable to resolve its differences with a government entity through conciliation, "the Commission *shall take no further action* and *shall refer the case* to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court" (emphases added). This provision makes clear that the discretion to bring a civil action lies with the Attorney General, and not the EEOC. Moreover, whether the Attorney General decides to bring a case or not, the EEOC is plainly prohibited from taking *any* "further action" in the dispute, a phrase that clearly encompasses efforts to join a tribe to an existing case.

In the district court, the EEOC argued that the limitations in Section 2000e-5(f)(1) do not apply to this suit because the EEOC seeks to litigate claims against the Nation in its capacity as a contracting authority, rather than in its capacity as an employer. Subsection (f), the Agency argued, governs suits only against a government "respondent," which is defined in the statute as an "employer" against whom a claim of discrimination is made. See 42 U.S.C. 2000e-5(f)(1). Moreover, the Commission argued, a tribe is specifically excluded from the definition of "employer." See *id.* § 2000e(b). Accordingly, because a tribe cannot be an employer or a "respondent" within the meaning of Title VII, the EEOC reasoned, the restrictions on the EEOC's authority in Section 2000e-5(f)(1) are inapplicable.

The district court rejected that argument, see Pet. App. 36a-37a, and the Ninth Circuit did not disturb its understanding of the statute. If the Nation is not a "respondent" for purposes of Section 2000e-5(f)(1)'s restrictions, it is also not a "respondent" for purposes of the Section's authorization for EEOC litigation. See 42 U.S.C. 2000e-5(f)(1) ("[T]he Commission may bring a civil action against any *respondent* not a government * * *." (emphasis added)). And if the EEOC's litigation with the Nation is not

authorized by Section 2000e-5(f), then the action is not authorized at all.[8] No provision other than Section 2000e-5(f) authorizes the EEOC to litigate claims against the Nation.[9] The authority to litigate against entities that do not meet the definition of "respondent" or "employer" is provided in Section 2000e-6, which authorizes the Attorney General to bring an action against "any person or group of persons [that] is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter." While much of this broader authority was subsequently transferred to the EEOC, see Section 2000e-6(d), the power to bring pattern and practice cases against a government entity was retained by the Attorney General, see Reorganization Plan No. 1 of 1978, reprinted in 92 Stat. 3781 (1978); *United States* v. *Fresno Unified Sch. Dist.*, 592 F.2d 1088, 1090-92 (CA9 1979) (discussing history of re-assignment).

Finally, even if the EEOC could lay claim to an implied authority to litigate its claims against the Nation outside of the

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[8] Absent authorization from Congress, a federal agency has no inherent authority to litigate claims in federal court. See, *e.g.*, *United States* v. *City of Philadelphia*, 644 F.2d 187, 198 (CA3 1980). Particularly when Congress has created an express and comprehensive enforcement scheme, further litigating authority beyond the terms provided in the statute cannot be implied. See *ibid.*

[9] In the district court, the EEOC attempted to find an unrestricted source of authority in the introductory paragraph of Section 2000e-5, which provides that the "Commission is empowered, *as hereinafter provided*, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title." 42 U.S.C. 2000e-5(a) (emphasis added). But that authority must, by the provision's plain terms, be exercised "as hereinafter provided." Among the things Congress "hereinafter provided" was that in the case of government entities, the EEOC shall "prevent any person from engaging in an unlawful employment practice" through referrals to the Attorney General, not through independent litigation.

express terms of Title VII, surely that *implied* authority is subject to the same limitations imposed on its *express* statutory authority. As discussed below, a contrary interpretation would be completely incompatible with the purposes for which litigation with government entities has been reserved to the Attorney General.

2. Purposes

Permitting the EEOC to invoke Rule 19 to litigate claims against an Indian tribe is plainly inconsistent with the reasons that led Congress to prohibit the EEOC from bringing such claims directly. The division of litigating authority between the EEOC and Attorney General reflects the special status of suits between the United States and other sovereigns as well as important differences between the EEOC and the Attorney General.

Under our constitutional system, state and local governments "are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty." *Alden* v. *Maine*, 527 U.S. 706, 715 (1999). Indian tribes likewise enjoy a special sovereign status under our constitutional system, forming "'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). Suits against such sovereigns are not lightly permitted. See, *e.g.*, *Dellmuth* v. *Muth*, 491 U.S. 223, 227-28 (1989) (requiring clear statement of congressional intent to subject State to suit); *C & L Enters.* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) (same for Indian tribe).

It is thus unsurprising that when Congress revised Title VII to permit suits against government employers in 1972, it did so with the reservation that such suits would be instituted only by the Attorney General rather than the EEOC. The Commission is an independent agency with an important, but circumscribed, mission. See 42 U.S.C. 2000e-4. The

Attorney General, on the other hand, is a presidential appointee with broad responsibilities who serves at the pleasure of the President. Congress thus clearly contemplated that litigation against sovereigns should be undertaken by those with greater political accountability than can be expected from the EEOC which is, by design, insulated from political oversight.

Placing litigating authority in the hands of the Attorney General also reflects that the federal government's relationship with government entities, including tribes, is more complex than with ordinary Title VII defendants. States and tribes are not only employers, but also grant recipients, co-operating law enforcement agencies, and frequently entities subject to regulation by administrative agencies. It is especially important in this context for the federal government to speak with one voice, informed by consultation with the wide range of government agencies that have a role in the United States's relationship with other sovereigns.

The general means by which Congress assures uniformity in the federal government's interpretation of federal statutes is by assigning to the Attorney General the dual responsibilities for conducting the Government's litigation and providing authoritative guidance to agencies on the meaning of federal law. See 28 U.S.C. 512, 516; 28 C.F.R. 0.25(a) (describing duties of Office of Legal Counsel within the Department of Justice). Particularly relevant to this case, the Department of Justice serves as the Department of Interior's lawyer, representing it in litigation over mineral leases and providing legal advice to the agency as it administers its responsibility to review and approve lease provisions. See 25 U.S.C. 396a, 396e; 28 U.S.C. 512. Accordingly, in deciding whether to approve the challenged preference provision in this case, the Department of Interior was entitled to seek a legal opinion from the Attorney General. See 28 U.S.C. 512. And if it came to doubt whether that approval was proper in light of the EEOC's new interpretation of Title VII, the Department

could at any time request a legal opinion on the question from the Office of Legal Counsel in the Department of Justice. See 28 C.F.R. 0.25(a). The Attorney General would, moreover, represent the Department of Interior in any litigation arising from a dispute between the Department and the Nation were the Department to require a change in the lease. 28 U.S.C. 516.

The consequences of permitting the EEOC to nonetheless pursue its own interpretation of Title VII in litigation with an Indian tribe are amply illustrated by the facts of this case. The disputed preference terms in this case were subject to review by – and were in fact approved by – the Department of Interior. See Pet. App. 30a, 45-46a. Indeed, the district court noted that the preference provisions were originally "drafted by the United States Secretary of Interior or his authorized representative and presented to [petitioner's predecessor in interest] with no meaningful opportunity to bargain over the employment preference term." *Id.* 29a. The leases have since been modified and extended with the Department's approval. *Ibid.* At no time has the Department sought to rescind approval of the leases or otherwise seek their reformation. *Id.* 46a. Nor has the Department enacted regulations prohibiting such preference terms. At the same time, the Attorney General apparently has never issued a legal opinion concluding that such preferences are illegal or instituted litigation against an Indian tribe seeking to prevent their enforcement. Under these circumstances, the Nation and petitioner should be entitled to rely on the continuing validity of the federally approved preference provisions unless and until appropriate action is taken by the Department of Interior and/or Department of Justice.

Nonetheless, the EEOC has sued petitioner, seeking substantial compensatory and punitive damages because petitioner has done nothing more than comply with the terms of the lease the Department of Interior approved. Rather than attempting to coordinate its position with the Department of Interior and Department of Justice through appropriate inter-

agency channels, the EEOC has sought to challenge the Interior-approved lease provisions in court. Those attempts have already imposed seriously unfair consequences on petitioner, which has relied on the Department of Interior approval in implementing the preference provision.[10]

Congress could have resolved this potential for conflict in a number of ways. It could have provided the EEOC exclusive interpretative authority over Title VII by giving it sole authority to pursue Title VII litigation and to resolve questions regarding the statute arising during the course of other agencies' administrative duties. But Congress clearly rejected that solution, vesting litigating authority instead with the Attorney General. See 42 U.S.C. 2000e-5(f)(1), 2000e-6. In the alternative, Congress could have subjected the EEOC's litigation to supervision by the Attorney General, the general mechanism by which Congress has assured that the federal government speaks with one voice in the federal courts. See 28 U.S.C. 516. But that would have sacrificed a measure of the EEOC's independence, an independence Congress thought important in order for the EEOC to carry out its mission.

Instead, Congress chose another approach, carefully carving out for the Attorney General the particular class of Title VII cases for which it was essential to ensure a coordinated federal position with respect to the rights and obligations of government entities, including Indian tribes.

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[10] Further incongruous results are yet possible, if not in this case, then in others. The Attorney General is responsible not only for representing the interests of the Department of Interior in court, 28 U.S.C. 516, but also frequently participates in litigation to protect the interests of tribes. See, *e.g.*, *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 657 (1979); see also 28 C.F.R. 0.65(b). Allowing the EEOC to sue a tribe based on a legal theory the Department of Interior and Attorney General reject could foreseeably lead to the embarrassment of the federal government appearing on both sides of the same case in federal court.

Permitting the EEOC to nonetheless litigate claims against an Indian tribe through the mechanism of a Rule 19 joinder is completely incompatible with the carefully calibrated solution Congress enacted. The Ninth Circuit's ruling approving the EEOC's position raises the same prospect for drawing courts into inter-agency conflicts, and creates the same unfairness to tribes and their contracting partners, as the direct suit that even the EEOC acknowledges it is prohibited from bringing.

3. Statutory Provisions Limiting Suits Against Government Entities Must Be Strictly Enforced.

The same sovereignty interests that led Congress to assign to the Attorney General the decision whether and how to litigate Title VII claims against government entities also require strict enforcement of the limitations on such suits established by the statute.

It is well established that "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma* v. *Mfg. Techs.*, 523 U.S. 751, 754 (1998). While Congress has plenary authority to remove that immunity, courts will assume that the immunity is intact unless Congress has made its decision to abrogate the tribes' immunity abundantly clear. See *C & L Enters., Inc.* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) ("To abrogate tribal immunity, Congress must 'unequivocally' express that purpose."). Suits against States are likewise precluded absent express Congressional authorization. See, *e.g.*, *Dellmuth* v. *Muth*, 491 U.S. 223, 227-28 (1989)

It is also within Congress's power to impose limits or conditions on suits against States and tribes, and when it does so, those limits and conditions must be respected. See, *e.g.*, *Kiowa Tribe*, 523 U.S. at 759. Strict adherence to such limitations is required both in order to respect Congress's intentions and to protect the tribe's right to have its immunity removed only in the manner approved by Congress.

To be sure, as the Ninth Circuit observed, a tribe may not invoke sovereign immunity against the United States itself. Pet. App. 10a. But whether and how the federal government has power to sue a tribe is a matter for Congress to determine. Just as Congress may decline to permit private individuals to sue tribes, so too it may preclude the executive branch from suing a tribe, or it may prescribe conditions and procedures for such suits. And just as the limitations imposed by Congress for private suits against tribes must be strictly adhered to, the conditions and procedures Congress establishes for federal government suits must also be strictly enforced.

B. Rule 19 May Not Be Used To Circumvent Limits Congress Has Established On A Party's Ability To Sue.

Because Congress has clearly withheld from the EEOC the right to adjudicate claims against Indian tribes, the EEOC is likewise precluded from relying on Rule 19 to seek to litigate the same claims with a tribe.

As the text of Rule 19 reflects, there are occasions on which an otherwise necessary party "cannot be made a party." Fed. R. Civ. P. 19(b). Rule 19 does not itself purport to be the source of the barriers to joinder, but rather simply acknowledges that other sources of substantive law may preclude the joinder of a party to a particular case in some circumstances. Thus, the rule acknowledges that 28 U.S.C. 1332 precludes joinder of a party when doing so would destroy the diversity of citizenship upon which a court's subject matter jurisdiction is based. Fed. R. Civ. P. 19(a). Other substantive barriers to joinder are not mentioned specifically in the Rule. For example, as the Ninth Circuit and other courts have held, a court may not join an Indian tribe to a case when Congress has not authorized a suit against the tribe, because doing so would vitiate the tribe's common law immunity from suit. See, *e.g.*, *Dawavendewa* v.

Salt River Project Agr. Improvement & Power Dist., 276 F.3d 1150, 1153 (CA9 2002).[11]

Common law immunities are simply one way in which the law precludes a plaintiff from adjudicating a claim against a particular party. Congress may also forbid such suits by assigning the responsibility for adjudicating such claims to someone else, often the government, or in this case a particular agency within the government. Thus, when Congress declines to authorize a private right of action, it makes clear its intent that the obligations imposed by the law shall be enforced only in a particular matter. Rule 19 may no more be used to circumvent this prohibition than it may be used to avoid a claim of immunity from suit. See *Vieux Carre*, 875 F.2d at 456-58. Similarly, in this case, the EEOC may not use Rule 19 to avoid Congress's restrictions on its authority to sue an Indian tribe.

To conclude otherwise draws Rule 19 into conflict with the Rules Enabling Act, 28 U.S.C. 2072(b). "[N]o reading of the Rule can ignore the Act's mandate that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'" *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (citations and internal quotation marks omitted). "The test must be whether a rule really regulates procedure[] – the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Hanna* v. *Plumer*, 380 U.S. 460, 464 (1965) (internal quotation marks

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[11] Like state sovereign immunity, which is "a sovereign immunity from suit, rather than a nonwaivable limit on the federal judiciary's subject-matter jurisdiction," *Idaho* v. *Coeur D'Alene Tribe*, 521 U.S. 261, 267 (1997), tribal immunity does not affect the subject matter jurisdiction of the federal courts. See, *e.g*, *Ninigret Dev. Corp.* v. *Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 28 (CA1 2000); *Kreig* v. *Prairie Island Dakota Sioux (In re Prairie Island Dakota Sioux)*, 21 F.3d 302, 304 (CA8 1994) (per curiam).

omitted). Whether a tribe may be subjected to an adjudication of its rights and obligations, and at whose insistence, is a question of substantive law, one that must be resolved by Congress. See *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."). There would be little doubt, for example, that a Rule could not establish a private right to enforce a statute that does not, itself, contemplate private enforcement. Cf. *id.* at 289-91 (when Congress authorized agency to promulgate regulations to "effectuate" statutory requirements, regulations may not themselves create a private right of action). Nor could the Rules authorize the EEOC to litigate claims against an Indian tribe when Congress has assigned that authority to someone else. Cf. *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001) (interpreting Rules to govern preclusive effect of federal judgment "would arguably violate" Enabling Act's prohibition against modification of substantive rights); *Ortiz*, 527 U.S. at 842 (adopting a "limiting construction" of class action rule to "minimize[] potential conflict with the Rules Enabling Act").

Hence, when Congress has precluded one party from directly adjudicating a claim against another, that prohibition may not be circumvented by adverting to Rule 19. This principle applies whether the barrier to direct suit arises from a lack of jurisdiction (personal or subject matter), because the absent party enjoys an immunity to a direct suit, or because Congress has assigned the right to adjudicate the issue with the absent party to another, either by declining to create a private right of action (see *Vieux Carre*, 875 F.2d at 456-58) or, as here, by assigning enforcement responsibilities to a specific federal agency to the exclusion of another.

Contrary to the Ninth Circuit's opinion, see Pet. App. 13a, petitioner's view is consistent with decisions such as *General Building Contractors Ass'n* v. *Pennsylvania*, 458

U.S. 375, 399 (1982).[12] In that case, this Court held that an innocent employer could be joined and subject to a modification of its contract with a union if necessary to remedy the union's history of race discrimination in violation of 42 U.S.C. 1981. 458 U.S. at 400-01. There was nothing in Section 1981 or any other federal statute that indicated that Congress intended to protect innocent employers from such adjudications or obligations, or limit the class of parties who could seek such relief. In contrast, Congress has made clear in this case that any Title VII litigation seeking a modification of the rights and responsibilities of an Indian tribe must be prosecuted by the Attorney General.

Nor does petitioner's position conflict with other ordinary uses of Rule 19 approved in this Court's prior cases. For example, in *Martin* v. *Wilks*, 490 U.S. 755, 763-65 (1989), this Court indicated that Rule 19 would apply to permit the joinder of white firefighters to a race discrimination suit by their African American colleagues against the fire department. Joinder would permit the white firefighters to object to any proposed remedy in the case that might adversely affect their employment rights. Petitioner's view does not preclude joinder in such cases. The joinder of parties who might have grounds to object to the relief requested by the plaintiff is, in essence, the equivalent of a declaratory judgment action by the plaintiff against the absent party to resolve those objections. So long as there would be no impediment to the plaintiff bringing that request for a declaratory judgment directly against the absent party, Rule 19 permits the joinder. However, when the plaintiff is precluded from bringing a direct action – when, for example, the absent party is a State or an Indian tribe that enjoys

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[12] See also *Zipes* v. *TWA*, 455 U.S. 385, 399-400 (1982); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 356 n.43 (1977); *EEOC* v. *MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1095-96 (CA6 1974).

immunity from suit – the plaintiff cannot achieve the prohibited result indirectly through Rule 19 joinder.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 15, 2005

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-17305

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,
v.
PEABODY WESTERN COAL COMPANY,
Defendant-Appellee.

March 3, 2005, Resubmitted
March 10, 2005, Filed

COUNSEL: Benjamin N. Gutman (Argued), EEOC, Washington, D.C., Ralph E. Chamness, Katherine Kruse, EEOC, Phoenix, Arizona, for the plaintiff-appellant.

Lawrence Jay Rosenfeld, Mary E. Bruno, John F. Lomax, Jr., Greenberg Traurig, Phoenix, Arizona, for the defendant-appellee.

JUDGES: Before: Procter Hug, Jr., Arthur L. Alarcon, and William A. Fletcher, Circuit Judges. Opinion by Judge William A. Fletcher.

OPINION

W. FLETCHER, Circuit Judge:

The Equal Employment Opportunity Commission ("EEOC") filed this action against Peabody Western Coal Company ("Peabody") for maintaining a Navajo hiring preference at the mines that Peabody leases from the Navajo Nation. The EEOC alleges that Peabody has discriminated against non-Navajo Native Americans, including two

members of the Hopi Nation and one member of the Otoe tribe, in violation of Title VII, 42 U.S.C. § 2000e-2(a)(1).

On appeal, we are presented with three questions. The first is whether, under Federal Rule of Civil Procedure 19, it is feasible to join the Navajo Nation as a party. We hold that it is feasible to join the Nation in order to effect complete relief between the parties. Because the EEOC is an agency of the United States, the Navajo Nation cannot assert its sovereign immunity as a defense to joinder. The second is whether the EEOC's claim presents a nonjusticiable political question. We hold that it does not. The third is whether the district court erred in dismissing the EEOC's claim that Peabody failed to keep records as required by Title VII, 42 U.S.C. § 2000e-8(c). We hold that it did. We reverse and remand for further proceedings.

I. Background

Peabody mines coal at the Black Mesa Complex on the Navajo and Hopi reservations in northeastern Arizona. It does so pursuant to leases with the tribes entered into by Peabody's predecessor-in-interest, the Sentry Royal Company ("Sentry"). Sentry entered into two leases with the Navajo Nation: a 1964 lease allowing it to mine on the Navajo Nation's reservation (lease no. 8580), and a 1966 lease allowing it to mine on the Navajo portion of land set aside for joint use by the Navajo and Hopi Nations (lease no. 9910). Both leases contain provisions requiring that preference in employment be given to members of the Navajo Nation. The 1964 lease provides that Peabody "agrees to employ Navajo Indians when available in all positions for which, in the judgment of [Peabody], they are qualified," and that Peabody "shall make a special effort to work Navajo Indians into skilled, technical, and other higher jobs in connection with [Peabody's] operations under this lease." The 1966 lease contains a similar provision, but also specifies that Peabody may "at its option extend the benefits of this Article [containing the Navajo employment preference] to Hopi

Indians." The record indicates that the language of the Navajo employment preferences remains unchanged and does not show that the preference has been extended to members of the Hopi Nation.

Pursuant to the Indian Mineral Leasing Act of 1938 ("IMLA"), the Department of Interior has approved both the leases, as well as subsequent amendments and extensions. *See* 25 U.S.C. §§ 396a, 396e; *see also United States v. Navajo Nation*, 537 U.S. 488, 493 (2003) (explaining that the Department of the Interior's approval is necessary before the leases become effective). If the lease terms are violated, the Navajo Nation and the Department of the Interior ("DOI") retain the power to cancel the leases after a notice and cure period.

In June 2001, the EEOC filed this action in District Court for the District of Arizona, alleging that Peabody was unlawfully discriminating on the basis of national origin by implementing the Navajo employment preference. Specifically, the EEOC's complaint charged that Peabody had refused to hire non-Navajo Native Americans – two members of the Hopi and one now-deceased member of the Otoe tribe, as well as unspecified other non-Navajo Native Americans – for positions for which they were otherwise qualified. The EEOC argued that such conduct violated 42 U.S.C. § 2000e-2(a)(1), which prohibits employers from refusing to hire applicants because of their national origin. The complaint further alleged that Peabody had violated the record-keeping requirements of § 2000e-8(c).

Questions arising out of transactions, including coal mining leases, on the Navajo and Hopi reservations and on the tribes' joint land have been extensively litigated. *See, e.g.*, *Navajo Nation*, 537 U.S. at 493-513 (rejecting claim by Navajo Nation that the Secretary of the Interior breached fiduciary duties owed to the Nation by approving the coal leases); *Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945, 946 (9th Cir. 2004) (holding that the court lacked jurisdiction

to enforce arbitration settlement agreement about lease royalty rates); *see also Clinton v. Babbitt*, 180 F.3d 1081, 1083-86 (9th Cir. 1999) (describing the lengthy dispute between Navajo and Hopi Nations over joint use land in Arizona); *Navajo Nation v. Peabody Holding Co.*, 209 F. Supp. 2d 269, 275-76 (D.D.C. 2002) (describing history of amendments to the leases in a RICO suit by the tribe against Peabody).

Navajo employment preference provisions also have been the subject of prior litigation. *See Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1163 (9th Cir. 2002) ("*Dawavendewa II*"); *Dawavendewa v. Salt River Agr. Imp. & Power Dist.*, 154 F.3d 1117, 1124 (9th Cir. 1998) ("*Dawavendewa I*"). In *Dawavendewa I*, we interpreted the Indian preference exception of Title VII, § 2000e-2(i), to permit discrimination in favor of Indians living on or near a reservation, but not to permit discrimination against Indians belonging to other tribes. *Id.* at 1124. On remand to the district court, the private contractor defendant moved to dismiss the case for failure to join the Navajo Nation as an indispensable party under Federal Rule of Civil Procedure 19(b).

In *Dawavendewa II*, 276 F.3d at 1153, we agreed with the district court that the Navajo Nation was an indispensable party. We held that "as a signatory to the lease . . . the Nation is a necessary party that cannot be joined because it enjoys tribal sovereign immunity." *Id.* We noted when balancing the factors to determine whether the Nation was an indispensable party that the plaintiff

> may have a viable alternative forum in which to seek redress. Sovereign immunity does not apply in a suit brought by the United States. Moreover, recently, in *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1075 (9th Cir. 2001), we held that because no principle of law 'differentiates a federal agency such as the EEOC from the United

> States itself,' tribal sovereign immunity does not apply in suits brought by the EEOC.

Id. at 1162-63. When the EEOC moved "at the eleventh hour" to intervene, we denied the motion. We observed, however, "that nothing precludes Dawavendewa from refiling his suit in conjunction with the EEOC." *Id.* at 1163.

In June 2002, the EEOC brought the present action, alleging intertribal discrimination as in *Dawavendewa I* and *Dawavendewa II*. In February 2002, Peabody moved for summary judgment under Federal Rule of Civil Procedure 56 and for dismissal of the action under Federal Rules of Civil Procedure 12(b)(7) and 12(b)(1). Peabody neither admitted nor denied that it had discriminated against non-Navajo Native Americans in violation of Title VII. Instead, Peabody asserted that Rule 19 required dismissal because the Navajo Nation was a necessary and indispensable party. Peabody also asserted that the issue of the legality of this lease provision was a nonjusticiable political question, on the theory that because the DOI had approved the mining leases, the court would have to make an "initial policy choice" between the positions of the DOI and the EEOC.

The district court held that it was not feasible to join the Navajo Nation, and that the Nation was not only a necessary but also an indispensable party. In the alternative, it found the legality of the Navajo employment preference in the lease to be a nonjusticiable political question. The district court dismissed the entire action, including the EEOC's record-keeping claim. The EEOC timely appealed. We reverse and remand for further proceedings.

II. Discussion

A. Joining the Navajo Nation Under Rule 19

Rule 19 governs compulsory party joinder in federal district courts. The district court held that it was not feasible to join the Navajo Nation because, under Title VII, the EEOC cannot directly sue the Nation. *See* 42 U.S.C. § 2000e(b)(1) (exempting Indian tribes from the statutory definition of

"employer"); *see also Dawavendewa II*, 276 F.3d at 1159 n.9 (observing that "pursuant to § 2000e(b), Indian tribes are specifically exempt from the requirements of Title VII"). Although the district court decided the issue on a motion for summary judgment, we construe the motion as one to dismiss for failure to join an indispensable party under Rule 12(b)(7). *See Dredge Corp. v. Penny*, 338 F.2d 456, 463-64 (9th Cir. 1964) (explaining that dismissal for failure to join a party must be decided on a motion to dismiss, not summary judgment). We review de novo the district court's legal conclusion that it is not feasible to join the Navajo Nation. *United States v. Bowen*, 172 F.3d 682, 688 (9th Cir. 1999) (explaining that although "generally, we review a district court's decision regarding joinder for abuse of discretion[,] . . . . we review legal conclusions underlying that decision de novo") (internal citation and quotation marks omitted).

We hold that the Navajo Nation is a necessary party under Rule 19. We hold, further, that where the EEOC asserts a cause of action against Peabody and seeks no affirmative relief against the Nation, joinder of the Nation under Rule 19 is not prevented by the fact that the EEOC cannot state a cause of action against it. Because the EEOC is an agency of the United States, the Nation cannot object to joinder based on sovereign immunity, as we noted in *Dawavendewa II*. 276 F.3d at 1162-63. We therefore hold that joinder of the Nation is feasible.

1. Rule 19

In relevant part, Rule 19(a) provides that

> [a] person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of

> the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. . . . If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

Rule 19(b) provides that if it is not feasible for the court to join a person meeting the requirements of Rule 19(a), the court

> . . . shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court [in determining whether a party is indispensable] include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Applying these two parts of Rule 19, there are three successive inquiries. *Bowen*, 172 F.3d at 688 (describing Rule 19's "three-step process"). First, the court must determine whether a nonparty should be joined under Rule 19(a). We and other courts use the term "necessary" to describe those "persons to be joined if feasible." Fed. R. Civ. P. 19(a); *see also Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861, 867 n.5 (9th Cir. 2004) (explaining that

the term "necessary" is a "term[] of art in Rule 19 jurisprudence"); *Bowen*, 172 F.3d at 688. If understood in its ordinary sense, "necessary" is too strong a word, for it is still possible under Rule 19(b) for the case to proceed without the joinder of the so-called "necessary" absentee. In fact, Rule 19(a) "defines the persons whose joinder in the action is *desirable*" in the interests of just adjudication. Fed. R. Civ. P. 19 Advisory Committee Note (1966) (emphasis added); *see also Bowen*, 172 F.3d at 688. Absentees whom it is desirable to join under Rule 19(a) are "persons having an interest in the controversy, and who ought to be made parties, in order that the court may act[.]" *Shields v. Barrow*, 58 U.S. (17 How.) 130, 139 (1854).

If an absentee is a necessary party under Rule 19(a), the second stage is for the court to determine whether it is feasible to order that the absentee be joined. Rule 19(a) sets forth three circumstances in which joinder is not feasible: when venue is improper, when the absentee is not subject to personal jurisdiction, and when joinder would destroy subject matter jurisdiction. *See* Fed. R. Civ. P. 19(a); *see also Tick v. Cohen*, 787 F.2d 1490, 1493 (11th Cir. 1986) (listing the three factors that may make joinder unfeasible).

Finally, if joinder is not feasible, the court must determine at the third stage whether the case can proceed without the absentee, or whether the absentee is an "indispensable party" such that the action must be dismissed. As the Advisory Committee Note explains, Rule 19 uses "the word 'indispensable' only in a conclusory sense, that is, a person is 'regarded as indispensable' when he cannot be made a party and, upon consideration of the factors [in Rule 19(b)], it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it." Fed. R. Civ. P. 19 Advisory Committee Note (1966). Indispensable parties under Rule 19(b) are "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final

termination may be wholly inconsistent with equity and good conscience." *Shields*, 58 U.S. at 139.

2. The Navajo Nation as a Necessary Party

The EEOC and Peabody agree, as they did in district court, that the Navajo Nation is a necessary party under Rule 19(a)(1) because the Nation is a party to the lease with Peabody. For the sake of clarity, we explain why we also agree. Rule 19(a) is "concerned with consummate rather than partial or hollow relief as to those already parties, and with precluding multiple lawsuits on the same cause of action." *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir. 1983) (citing Advisory Committee's Note Fed. R. Civ. P. 19 (1966)). As in *Dawavendewa II*, 276 F.3d at 1156, the Nation is a signatory to lease provisions that the plaintiff challenges under Title VII. The EEOC seeks declaratory, injunctive, and monetary relief. If the EEOC is victorious in its suit against Peabody, monetary damages for the charging parties can be awarded without the Nation's participation. But declaratory and injunctive relief could be incomplete unless the Nation is bound by res judicata. The judgment will not bind the Navajo Nation in the sense that it will directly order the Nation to perform, or refrain from performing, certain acts. But it will preclude the Nation from bringing a collateral challenge to the judgment. If the EEOC is victorious in this suit but the Nation has not been joined, the Nation could possibly initiate further action to enforce the employment preference against Peabody, even though that preference would have been held illegal in this litigation. Peabody would then be, like the defendant in *Dawavendewa II*, 276 F.3d at 1156, "between the proverbial rock and a hard place – comply with the injunction prohibiting the hiring preference policy or comply with the lease requiring it." By similar logic, we have elsewhere found that tribes are necessary parties to actions that might have the result of directly undermining authority they would otherwise exercise. *See Pit River Home v. United States*, 30 F.3d 1088, 1092 (9th

Cir. 1994) (Pit River Tribal Council was a necessary party in suit challenging its designation by the Secretary of Interior as the beneficiary of reservation property); *Confederated Tribes of Chehalis Reservation v. Lujan*, 928 F.2d 1496, 1497 (9th Cir. 1991) (Quinault Nation was a necessary party in suit challenging the United States' continued recognition of the Nation as sole governing authority of the Quinault Indian Reservation). Following these cases, we conclude that the Navajo nation is a necessary party under Rule 19(a).

3. Feasibility of Joinder

We turn next to the issue of whether it is feasible to join the Navajo Nation. Peabody does not contest that the court could exercise personal jurisdiction over the Nation. Rather, Peabody argues that the district court lacked jurisdiction because of the Nation's sovereign immunity.

In many cases in which we have found that an Indian tribe is an indispensable party, tribal sovereign immunity has required dismissal of the case. *See, e.g., Dawavendewa II*, 276 F.3d at 1163; *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1027 (9th Cir. 2002). By contrast, in a suit brought by the EEOC, the Nation's tribal sovereign immunity does not pose a bar to its joinder. Tribal sovereign immunity does not "act as a shield against the United States," even when Congress has not specifically abrogated tribal immunity. *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986); *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382 (8th Cir. 1987). Because the EEOC is an agency of the United States, "tribal sovereign immunity does not apply in suits brought by the EEOC." *Dawavendewa II*, 276 F.3d at 1162-63; *Karuk*, 260 F.3d at 1075.

Peabody argues, however, that the district court lacked the authority to join the Nation because the EEOC cannot state a claim against an Indian tribe under Title VII. The parties agree that the EEOC cannot sue an Indian tribe under Title VII regarding the tribe's own employment practices.

Under § 2000e(b), an Indian tribe is specifically exempt from the definition of "employer," and thus Title VII does not apply to Indian tribes when they act as employers. In addition, Title VII limits the EEOC's authority to proceed against "a respondent which is a government, governmental agency, or political subdivision." 42 U.S.C. § 2000e-5(f)(1). In the case of a governmental respondent, if the EEOC fails to resolve the matter by informal means, the EEOC "shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent." *Id.*

However, a plaintiff's inability to state a direct cause of action against an absentee does not prevent the absentee's joinder under Rule 19. In *Beverly Hills Federal Savings and Loan Association v. Webb*, 406 F.2d 1275, 1279-80 (9th Cir. 1969), we stated that "a person may be joined as a party [under Rule 19(b)] for the sole purpose of making it possible to accord complete relief between those who are already parties, even though no present party asserts a grievance against such person." We held that a title company acting as a trustee for some of the defendants' property was properly named as a defendant "for the *sole purpose* of 'facilitating' the enforcement of any orders that might be made by the court with respect to the trust or the trust property." *Id.* at 1279 (emphasis added). We so held even though the plaintiff did not "assert any claim against the Title Company with respect to which [the district] court has subject matter jurisdiction." *Webb*, 406 F.2d at 1279 (emphasis added).

In *National Wildlife Federation v. Espy*, 45 F.3d 1337, 1344-45 (9th Cir. 1995), we held that private parties could be named as defendants along with federal agencies in a suit brought under the Administrative Procedure Act to enforce rights conferred by the National Environmental Policy Act and by the Food, Agriculture, Conservation and Trade Act of 1990. Although none of these statutes authorized causes of action against the private parties, we held that Rule 19 nonetheless authorized their joinder as defendants. *Id.* In so holding, we cited *Sierra Club v. Hodel*, 848 F.2d 1068, 1077

(10th Cir. 1988), in which the Tenth Circuit held that joinder of a county was proper in an action under the Administrative Procedure Act against a federal agency, even though the plaintiff could not sue the county directly.

Our circuit's reading of Rule 19 not to require a cause of action between a plaintiff and a party sought to be joined under the rule is consistent with Supreme Court precedent. In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 356 (1977), the Supreme Court held that a labor union named as a defendant was not liable for any discrimination. Thus, the plaintiff had no viable cause of action against the union. Accordingly, the Court vacated a district court injunction against the union. Nevertheless, the Supreme Court wrote that "the union will properly remain in this litigation as a defendant so that full relief may be awarded the victims of the employer's post-Act discrimination." *Id.* at 356 n.43 (citing Fed. R. Civ. P. 19(a); *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1095 (6th Cir. 1974)). The Supreme Court reaffirmed *Teamsters*' approach to Rule 19 in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 400 & n.14 (1982) (reiterating the Supreme Court's holding in *Teamsters*, 431 U.S. at 356, n.43).

We recognize that the Fifth Circuit has stated that "it is implicit in Rule 19(a) itself that before a party . . . will be joined as a defendant the plaintiff must have a cause of action against it." *Vieux Carre Prop. Owners v. Brown*, 875 F.2d 453, 457 (5th Cir. 1989); *see also Davenport v. Int'l Bhd. of Teamsters, AFL-CIO*, 166 F.3d 356, 366 (D.C. Cir. 1999) (quoting this statement from *Vieux Carre*). However, our circuit has never agreed with the rule stated in *Vieux Carre*. Moreover, the actual holdings of *Vieux Carre* and *Davenport* (as distinct from their abstract statement of the rule) can be reconciled with the Supreme Court's and with our own Rule 19 cases. In *Vieux Carre* and *Davenport*, the courts were answering different questions from the question in this case. In *Vieux Carre*, the issue was whether the court could join

under Rule 19 and then impose an injunction directly on a party against whom the plaintiff could not state a cause of action. The court held it could not. 875 F.2d at 456-57. In *Davenport*, the issue was the same as in *Vieux Carre*. 166 F.3d at 366. The D.C. Circuit held in *Davenport*, "it is not enough that plaintiffs 'need' an injunction against Northwest in order to obtain full relief. They must also have a right to such an injunction, and Rule 19 cannot provide such a right." *Id.*

The difference between the situation presented here, in which plaintiffs seek no affirmative relief against the Navajo Nation, and that in *Vieux Carre* and *Davenport*, in which plaintiffs sought injunctions against the party sought to be joined, is captured in the majority and concurring opinions in *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375 (1982). In *General Building*, the Supreme Court held that injunctive relief to enforce Title VII rights could not be granted against employers who were "parties found not to have violated any substantive rights of [the plaintiffs]." *Id.* at 399. The Court, however, also clarified that "this is not to say that [the employer] defendants . . . might not, upon an appropriate evidentiary showing, be retained in the lawsuit and even [be] subject to such minor and ancillary provisions of an injunctive order as the District Court might find necessary to grant complete relief." *Id.* (citing *Zipes*, 455 U.S. at 399-400). In her concurrence, Justice O'Connor emphasized this point, observing that even though the Court in *Teamsters v. United States*, 431 U.S. 324 (1977), had found that the union had not violated Title VII, it had nonetheless "directed the union [under Rule 19] to remain in the litigation as a defendant so that full relief could be awarded the victims of the employer's post-Act discrimination." *Id.* at 405 (O'Connor, J., concurring) (quoting *Zipes*, 455 U.S. at 399-400).

As in *Teamsters*, *Espy*, and *Webb*, the EEOC has no claim against the party it seeks to join and is not seeking any affirmative relief directly from that party. Joinder is necessary

for the "sole purpose" of effecting complete relief between the parties, *Webb*, 406 F.2d at 1279-80, by ensuring that both Peabody and the Nation are bound to any judgment upholding or striking down the challenged lease provision. Because the EEOC is not seeking to hold the Navajo Nation liable under Title VII, we reject Peabody's argument that our reading of Rule 19 conflicts with the Rules Enabling Act's restriction that the federal rules of civil procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Joinder of the Nation does not, and cannot, create any substantive rights that the EEOC may enforce against the Nation, and the EEOC does not contend otherwise.

Our interpretation is consistent with other courts that have allowed the EEOC to join a party under Rule 19 against which it does not or cannot state a cause of action. In *EEOC v. Union Independiente de la Autoridad de Acueductos*, 279 F.3d 49, 52 (1st Cir. 2002), for example, the EEOC filed a complaint against a labor union for alleged discrimination against an employee. The First Circuit observed without disapproval that the EEOC had named a Puerto Rican governmental employer as a Rule 19 defendant "to ensure that complete relief, including [the employee's] reinstatement, was available." *Id.* Under Peabody's theory of Rule 19 and Title VII, the EEOC would not have had statutory authority to join a government as an employer because it could not sue that employer directly. *See* 42 U.S.C. § 2000e-5(f)(1) (granting authority to litigate against a government respondent to the Attorney General). In *EEOC v. MacMillan Bloedel*, the Sixth Circuit held that it was proper to join a union under Rule 19, although the union was not charged with a Title VII violation. 503 F.2d at 1088. The court so held "because the decree entered by the court might affect its collective bargaining agreement[.]" *Id.* at 1095. "As a practical matter," the Sixth Circuit observed, "the Union need not play a role in the litigation until the court finds that [the employer] has violated Title VII." *Id.*; *see also id.* at 1096 (citing cases in which union was joined in order to participate

in the remedy). We agree with the Sixth Circuit in *MacMillan Bloedel* that our understanding of Rule 19 is "consistent with Title VII's grant of broad equitable powers to the courts to eradicate the present and future effects of past discrimination." 503 F.2d at 1095-96. *See also Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 333 (1980) (stating that Congress intended to give the EEOC "broad enforcement powers.").

Our interpretation of Rule 19 is also consistent with both the purpose and text of the rule. The Northern District of California provided a succinct statement of this purpose when it explained that "by definition, parties to be joined under Rule 19 are those against whom no relief has formally been sought but who are so situated as a practical matter as to impair either the effectiveness of relief or their own or present parties' ability to protect their interests." *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee*, 440 F. Supp. 506, 518 (N.D. Cal. 1977). The Nation fits this definition – it is a party against which relief has not formally been sought but is so situated that effectiveness of relief for the present parties will be impaired if it is not joined. We hold that its joinder is feasible. *See* Fed. R. Civ. P. 19(a).

Finally, we note what we do, and do not, decide today. We do decide that the Navajo Nation is a necessary party that is feasible to join under Rule 19(a). However, we do not decide, even implicitly, the merits of the EEOC's Title VII suit against Peabody. That determination is for the district court on remand.

B. Political Question Doctrine

We next address the district court's ruling that the case involves a nonjusticiable political question. In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court identified six factors that may make a question nonjusticiable:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable

> and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. *See also Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 702 (9th Cir. 1992) (quoting the six *Baker* factors). The *Baker* factors must be interpreted in light of the purpose of the political question doctrine, which "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Association v. Am. Cetacean Society*, 478 U.S. 221, 230 (1986).

The district court misunderstood the political question doctrine when it held that the third, fourth, and sixth *Baker* factors were implicated by the EEOC's claim. A nonjusticiable political question exists when, to resolve a dispute, the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis. *See Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992). While it is true that the EEOC is challenging a lease that the DOI has approved, the district court was not called upon to make an "initial policy determination." Resolving whether and how Title VII applies is a matter of statutory interpretation and thus involves simply implementing policy determinations Congress has already made. The issues here are entirely legal, and are of a sort "familiar to the courts. " *Eu*, 979 F.2d at 702.

Nor do the fourth and fifth *Baker* factors apply merely because, at the behest of the EEOC, the district court was asked to rule on the legality of a lease that the DOI had approved. We regularly review the actions of federal agencies to determine whether they comport with applicable law. *See Japan Whaling Ass'n*, 478 U.S. at 230 (explaining that the political question doctrine did not bar a challenge to the Secretary of Commerce's action when a decision required "applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented"). Nor do controversies between departments of the federal government necessarily present political questions. *See, e.g., United States v. Nixon*, 418 U.S. 683, 693 (1974) (dispute between the President and the Special Prosecutor); *United States v. ICC*, 337 U.S. 426, 430 (1949) (suit by the United States to review decision of the Interstate Commerce Commission); *TVA v. EPA*, 278 F.3d 1184, 1198 (11th Cir. 2002) (dispute between federal agencies about the meaning of the Clean Air Act). We therefore conclude that no part of this case presents a nonjusticiable political question.

C. Record-Keeping Claim

We turn finally to the EEOC's record-keeping claim. Title VII requires a covered employer to make and preserve records that are "relevant to the determinations of whether unlawful employment practices have been or are being committed." 42 U.S.C. § 2000e-8(c). In its complaint, the EEOC alleged that Peabody had failed to keep employment applications and sought an injunction directing Peabody to do so. Peabody has a record-keeping obligation under Title VII unrelated to the challenged Navajo employment preference. Although the district court did not explicitly discuss or analyze this claim, its entry of final judgment nonetheless effectively dismissed it.

Peabody's motion for summary judgment did not mention the record-keeping claim, and its motion to dismiss

argued only that the EEOC was not entitled to a jury trial on the claim. In the absence of argument by the parties, fair notice to the EEOC that its record-keeping claim faced dismissal, or any justification offered by the district court for entering summary judgment on the claim, we vacate the judgment as to the EEOC's record-keeping claim and remand for further proceedings. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (the moving party "bears the initial responsibility of informing the district court of the basis for its motion"); *Couveau v. American Airlines, Inc.*, 218 F.3d at 1081 (observing that when the reasons for the district court's decision are not clear, we may vacate summary judgment and remand).

Conclusion

We do not decide the merits of the EEOC's Title VII claim against Peabody today. We hold simply that the Navajo Nation is a necessary party to the action, and that it is feasible to join the Nation in order to effect complete relief between the parties. We also hold that the EEOC's suit does not present a non-justiciable political question. Finally, we reverse the district court's dismissal of the EEOC's record-keeping claim. We remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 01-1050-PHX-MHM

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,
vs.
PEABODY COAL COMPANY,
Defendant.

September 24, 2002, Decided
September 26, 2002, Filed

COUNSEL: For EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, plaintiff: Mary Joleen O'Neill, Esq, Katherine J Kruse, Equal Employment Opportunity Commission, Phoenix, AZ.

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For DELBERT MARIANO, THOMAS SAHU, intervenors: Tod F Schleier, Esq, Bradley Hugh Schleier, Esq, James M Jellison, Schleier Jellison & Schleier PC, Phoenix, AZ.

ORDER

Pending before this Court are the following motions: Defendant's Motion for Summary Judgment (Doc. # 38); Defendant's Motion to Dismiss and/or Stay and/or Motion to Strike (Doc. # 24); Plaintiff's Motion to Strike Portions of the Statement of Facts and Affidavits Submitted by Defendant in Support of its Motion for Summary Judgment (Doc. # 43); Defendant's Motion to Strike Plaintiff's Reply in Support of

Plaintiff's Motion to Strike as Untimely (Doc. # 49); and Delbert Mariano and Thomas Sahu's Motion to Intervene as Plaintiffs (Doc. # 23).

I. FACTUAL BACKGROUND

The Equal Employment Opportunity Commission ("EEOC") has filed this Complaint against Peabody Western Coal Company ("Peabody Coal") claiming a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § § 2000e *et seq.*

Specifically, the EEOC alleges that Peabody Coal violates Title VII's prohibitions against national original discrimination by giving preference in hiring to Navajos over non-Navajo Native Americans at its coal mining operations located on the Navajo and Hopi Indian Reservations (the "Black Mesa Complex").

The EEOC claims that Delbert Mariano and Thomas Sahu, members of the Hopi Tribe, and Robert Koshiway, a member of the Otoe Tribe (now deceased), applied for positions with Peabody Coal and were denied employment in favor of members of the Navajo Nation. Before filing this lawsuit against Peabody Coal, the EEOC engaged in some informal conciliation. The conciliation process failed to resolve the matter, and this lawsuit was filed.

A. THE COAL LEASES

Peabody Coal conducts coal mining operations on the Navajo and Hopi Reservations in northeastern Arizona pursuant to drilling and exploration permits and coal mining leases executed with the respective tribes.[1] These permits and coal leases require Peabody Coal to provide preference in employment to members of the respective tribes. These permits and coal leases also require approval of the United

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[1] These operations provide coal to the Salt River Project Agricultural Improvement and Power District generating station in Page, Arizona, and to Southern California Edison's Mojave generating station.

States Secretary of the Interior under certain circumstances. Specifically, these provisions are as follows.

1. The 1961 Navajo Permit

The Drilling and Exploration Permit executed on May 13, 1961 between The Navajo Tribe of Indians and Sentry Royalty Company, Peabody Coal's predecessor in interest, provides in pertinent part:

> 9. Permittee shall commence prospecting operations for coal within ninety (90) days of the approval of this permit by the Secretary of the Interior ...
>
> 10. Permittee will employ members of the Navajo Tribe when available in all positions for which they are qualified and pay prevailing wages to such Navajo employees. Permittee will make a special effort to work members of the Navajo Tribe into skilled, technical and other jobs in connection with its operations under this permit.
>
> ***
>
> 12. This permit shall not be assignable without approval of the Advisory Committee of the Navajo Tribal Counsel and the Secretary of the Interior.

This Drilling and Exploration Permit (the "1961 Navajo Permit") was signed and is dated February 6, 1962, by James F. Canan, assistant area director, Bureau of Indian Affairs, Department of the Interior. Article XIX of the form Lease attached as Exhibit B to the 1961 Navajo Permit" also contains a Navajo employment preference provision as follows:

> ARTICLE XIX. NAVAJO EMPLOYMENT PREFERENCE
>
> Lessee agrees to employ Navajo Indians when available in all position for which, in the judgment of Lessee, they are qualified, and to pay prevailing wages to such Navajo employees and to

utilize services of Navajo contractors whenever feasible.

Lessee shall make a special effort to work Navajo Indians into skilled, technical and other higher jobs in connection with Lessee's operations under this lease.

2. The 1964 Navajo Coal Lease No. 8580

A Mining Lease executed on February 1, 1964 between the Navajo Tribe and Sentry Royalty Company, Peabody Coal's predecessor in interest, for the lands that were subject of the 1961 Navajo Permit ("Navajo Coal Lease No. 8580"), provides in pertinent part:

ARTICLE VI. TERMINATION OF FEDERAL JURISDICTION

During the period that the land so leased is under Federal jurisdiction, the royalty provisions of this lease are subject to reasonable adjustment by the Secretary of the Interior or his authorized representative at the end of twenty years from the effective date of this lease, and at the end of each successive ten-year period thereafter. . .

***

ARTICLE VIII. SUSPENSION OF MINING OPERATIONS

Whenever permitted by law, if the Secretary of the Interior or his authorized representative considers the marketing facilities inadequate or the economic conditions unsatisfactory, he may, with the concurrence of the Advisory Committee of the Navajo Tribal Council, authorize the suspension of mining operations for such time as he considers advisable. . .

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ARTICLE X. REGULATIONS

Lessee shall abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases. . .

***

ARTICLE XI. ASSIGNMENT OF LEASE

Lessee shall not assign this lease or any interest therein by an operating agreement or otherwise, or sublet any portion of the leased premises, except with the prior approval of the Secretary of the Interior and the Advisory Committee of the Navajo Tribal Council. . .

***

ARTICLE XVI. CANCELLATION AND FORFEITURE

When, in the opinion of the Mining Engineer of the Navajo Tribe and the Secretary of the Interior, before restrictions are removed, there has been a violation of any of the terms and conditions of this lease, the Secretary of the Interior and the Navajo Tribe shall have the right . . . to declare this lease null and void. . .

***

ARTICLE XIX. NAVAJO EMPLOYMENT PREFERENCE

Lessee agrees to employ Navajo Indians when available in all positions for which, in the judgment of Lessee, they are qualified, and to pay prevailing wages to such Navajo employees and to utilize services of Navajo contractors where feasible.

Lessee shall make a special effort to work Navajo Indians into skilled, technical and other

higher jobs in connection with Lessee's operations under this Lease.

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ARTICLE XXII. OBSERVANCE OF TRIBAL RESOLUTIONS

"Lessee agrees to comply with all lawful resolutions adopted by the Navajo Tribal Council."

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ARTICLE XXVIII. NOTICES

Any notice, demand or request provided for in this lease, or given or made in connection with it shall be deemed to be properly given if delivered in person, or sent by registered or certified mail . . . to the persons specified below:

To or upon the Tribe:

Chairman
Navajo Tribal Council
Window Rock, Arizona

and

General Superintendent
Navajo Agency, Bureau of Indian Affairs
Window Rock, Arizona ...

Navajo Coal Lease No. 8580 was approved on August 28, 1964 by John C. Dibbern, assistant area director of the Bureau of Indian Affairs, Department of the Interior.

3. The 1964 Joint Use Permit

A Drilling and Exploration Permit executed on June 1, 1964 between The Hopi Tribe of Arizona and The Navajo Tribe of Indians and Sentry Royalty Company, Peabody Coal's predecessor in interest (the "Joint Use Permit"), contains provisions nearly identical to those in the 1961

Navajo Permit. The Joint Use Permit provides in pertinent part:

> 1. Pursuant to authority contained in a resolution of the Hopi Tribal Council, H-7-64 dated June 1, 1964, and a resolution of the Advisory Committee of the Navajo Tribal Council, ACMY-77-64 dated May 7, 1964, Permittee is hereby granted the exclusive right to drill and explore for coal for a period of two years from and after the date of approval hereof by the Secretary of the Interior. . .
>
> ***
>
> 10. Permittee will employ members of the Hopi and Navajo Tribes when available in all positions for which they are qualified and pay prevailing wages to such Hopi and Navajo employees. Permittee will make a special effort to work members of the Hopi and Navajo Tribes into skilled, technical, and other higher jobs in connection with its operations under this permit.
>
> ***
>
> 12. This permit shall not be assignable without the prior approval of the Hopi Tribal Council, the Advisory Committee of the Navajo Tribal Council, and the Secretary of the Interior.

The Joint Use Permit was approved and signed on October 20, 1964 by John C. Dibbern, area director, Gallup Area Office, Bureau of Indian affairs, Department of the Interior, and on October 23, 1964, by George W. Hadden, area director, Phoenix Area Office, Bureau of Indian Affairs, Department of the Interior.

Exhibit B to the Joint Use Permit, made a part thereof pursuant to paragraph 1 of the Joint Use Permit, and entitled "United States Department of the Interior Bureau of Indian Affairs Mining Lease between Sentry Royalty Company

[Peabody Coal's predecessor in interest] and the Hopi and Navajo Tribes" (the "Joint Use Lease") contains provisions nearly identical to those in Coal Lease No. 8580, except that employment preference is given to both Hopis and Navajos. Before execution of the Joint Use Lease, however, a dispute arose regarding the terms of this Joint Use Lease. As a result, the Hopi Tribe and the Navajo Tribe executed separate mining leases on June 6, 1966.

The resulting Hopi Coal Lease, entitled "United States Department of the Interior Bureau of Indian Affairs Mining Lease between the Hope [sic] Tribe, State of Arizona and Sentry Royalty Company" required Sentry (predecessor in interest to Peabody Coal) to give Hopi Indians preference in hiring, allowed the Hopi Tribe to extend the preference to Navajo Indians, and required Sentry (predecessor in interest to Peabody Coal) to "make a special effort to work Hopi and Navajo Indians into skilled, technical and other higher jobs in connection with Lessee's operations under this lease.

4. The 1966 Navajo Coal Lease No. 9910

The resulting Navajo Lease ("Navajo Coal Lease No. 9910"), "United States Department of the Interior Bureau of Indian Affairs Mining Lease between Sentry Royalty Company and the Navajo Tribe State of Arizona," contained terms virtually identical to those in Navajo Coal Lease No. 8580, except that it allowed Sentry, predecessor in interest to Peabody Coal, to extend the employment preference provision to members of the Hopi Tribe. It provided in pertinent part as follows:

> ARTICLE IV. ANNUAL RENTAL
>
> Lessee agrees . . . to pay or cause to be paid to the Secretary of the Interior or his authorized representative, for the use and benefit of the Navajo Tribe. . .
>
> ***

ARTICLE VI. SUSPENSION OF MINING OPERATIONS

Whenever permitted by law, if the Secretary of the Interior or his authorized representative considers the marketing facilities inadequate or the economic conditions unsatisfactory, he may, with the concurrence of the Lessor, authorize the suspension of mining operations for such time as he considers advisable. . .

***

ARTICLE VIII. REGULATIONS

Lessee shall abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases. . .

***

ARTICLE IX. ASSIGNMENT OF LEASE

Lessee shall not assign this lease or any interest therein by an operating agreement or otherwise, or sublet any portion of the leased premises, except with the prior approval of the Secretary of the Interior and the Lessor. .

***

ARTICLE XI. INSPECTION

The leased premises and producing operation, improvements, machinery and fixtures thereon and connected therewith and all pertinent books and accounts of Lessee shall be open at all times for inspection by agents of the Lessor or any duly authorized representative of the Secretary of the Interior.

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ARTICLE XIV. CANCELLATION AND FORFEITURE

When, in the opinion of the Lessor and the Secretary of the Interior, before restrictions are removed, there has been a violation of any of the terms and conditions of this lease, the Secretary of the Interior and the Lessors shall have the right . . . to declare this lease null and void. . .

***

ARTICLE XVII. EMPLOYMENT PREFERENCE

Lessee agrees to employ Navajo Indians when available in all positions for which, in the judgment of Lessee, they are qualified, and to pay prevailing wages to such Navajo employees and to utilize services of Navajo contractors where feasible.

Lessee shall make a special effort to work Navajo Indians into skilled, technical and other higher jobs in connection with Lessee's operations under this Lease. Lessee may at its option extend the benefits of this Article to Hopi Indians.

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ARTICLE XXVII. NOTICES

Any notice, demand or request provided for in this lease, or given or made in connection with it, shall be deemed to be properly given if delivered in person, or sent by registered or certified mail ... to the persons specified below:

Chairman
Navajo Tribal Council
Window Rock, Arizona

Secretary of the Interior (2 copies). . .

Navajo Coal Lease 9910 was approved and signed on July 7, 1966, by Graham Holmes, area director, Bureau of Indian Affairs, Department of the Interior.

5. Drafting, Negotiations, and Amendments

Peabody Coal in-house counsel Edward L. Sullivan Jr. has testified by affidavit that it is his understanding, based on his review of the 1961 Navajo Permit and the 1964 Joint Use Permit and the history of Peabody Coal's leasing rights in Arizona, that the 1961 Navajo Permit and the form of lease attached as Exhibit B thereto and the 1964 Joint Use Permit and the form of lease attached as Exhibit B thereto were drafted by the United States Secretary of Interior or his authorized representative and presented to Sentry with no meaningful opportunity to bargain over the employment preference term.

The 1964 Navajo Coal Lease No. 8580 and the 1966 Navajo Coal Lease No. 9910 contain virtually identical terms as excerpted above, to the terms in the form leases, with the exception that the 1966 Navajo Coal Lease No. 9910 allows Sentry to extend the Navajo hiring preference to the Hopi Tribe as well.

Attorney Sullivan has further testified pursuant to affidavit that the 1964 Navajo Coal Lease No. 8580 and the 1966 Navajo Coal Lease No. 9910 have been amended twice since they were executed, each time with the approval of the Secretary of the Interior, and each time without any changes to the employment preference provision. In 1987, he testified, a new article was added to each lease, stating that all provisions of the original leases would continue in full force and effect, except as expressly modified by the amendments. The most recent amendment was approved on March 29, 1999, by Bruce Babbitt, then Secretary of the Interior, he testified.

Attorney Marvin O. Young, former Peabody Coal general counsel from 1968 to 1985, further testified by affidavit that he is familiar with two other Mining Leases

executed with the Navajo Nation, one by Utah International, and one by P&M, and that each contains a Navajo employment preference clause. He testified by affidavit that "It is my understanding that the United States Secretary of the Interior required these employment preference provisions as a condition of the leases, as part of a standardized practice by the Secretary of the Interior at the time."

5. Navajo Preference in Employment Act

While this lawsuit has been pending, Peabody Coal has been subject to legal action by the Navajo Nation seeking to enforce the Navajo Preference in Employment Act, 15 NNC § 601, *et seq.*

Section 604 of the Navajo Preference in Employment Act states as follows:

> **§ 604. Navajo employment preference**
>
> A. All employers doing business within the territorial jurisdiction [or near the boundaries] of the Navajo Nation, or engaged in any contract with the Navajo Nation, shall:
>
> 1. Give preference in employment to Navajos. . .

15 NNC § 604.

B. EEOC'S OBJECTIONS TO THE EVIDENCE

The EEOC has not offered any evidence to controvert the evidence offered by Peabody Coal and outlined above, nor has it suggested that it has any such evidence. The EEOC has not disputed that the documents offered by Peabody Coal, specifically the 1961 Navajo Permit, the 1964 Joint Use Permit, the Hopi Lease, and 1964 Navajo Coal Lease No. 8580 and the 1966 Navajo Coal Lease No. 9910 contain the terms outlined.[2]

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[2] The EEOC states at page 2 of its brief that "to the extent that the two affiants' avowals rely on actual language from the lease

The EEOC, however, has moved to strike certain statements outlined in section A.4., *supra*, by Peabody Coal former and present in-house counsel relating to the Secretary of Interior's direct involvement in drafting and approving the Coal Leases, and whether the Navajo employment preference is typically included in such Coal Leases. These statements, the EEOC argues, should not be admitted with regards to Peabody Coal's argument that the issue in this litigation presents a nonjusticiable political question.

The EEOC originally also moved to strike Mr. Sullivan's sworn statements referring to the contents of the amendments to the Coal Leases, *i.e.*, his testimony that the Coal Lease amendments did not change the Navajo hiring preference. The EEOC, however, has since stipulated that the amendments and related supplements to Navajo Coal Lease 8580 and Navajo Coal Lease 9910 "did not change, or address, the hiring preferences outlined in those leases." *See* Corrected Stipulation Regarding Lease Amendments, dated 7/23/02 (Doc. # 57).

The EEOC apparently retains its original objections to Mr. Sullivan's sworn statements as to his understanding that the Secretary of the Interior drafted the original Permits and form of Leases, and that Sentry was not provided the opportunity to bargain over the employment preference term, arguing he has not shown personal knowledge of the negotiations. The EEOC also moved to strike Attorney Young's statement that it was his understanding that the Navajo employment preference was required by the Secretary of Interior in mining leases, and was typical of such leases, on the ground attorney Young has not established personal knowledge.

Peabody Coal, however, cites to a brief that the EEOC filed with the United States Court of Appeals for the Ninth

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agreements or other documents attached to their affidavits, the Commission has not challenged the avowals."

Circuit, wherein Peabody Coal conceded that the Navajo employment preference provisions are aggressively pushed by the Navajo Nation and are in a number of the Navajo Nation's lease agreements. *See* EEOC's Motion to Intervene in *Dawavendewa v. Salt River Project Agricultural Improvement and Power District*, at p. 14, attached as Ex. B to Defendant's Response to Plaintiff's Motion to Strike.

II. PROCEDURAL BACKGROUND

Defendant Peabody Coal has moved pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment to dismiss this Complaint on the ground that 1) the Navajo Nation is a necessary and indispensable party to this litigation and its joinder is not feasible under Rule 19(b) because the EEOC is not empowered to bring this action against the tribe; or alternatively 2) this case presents a nonjusticiable political question. In the event this Court does not grant Peabody Coal's motion for summary judgment, Defendant Peabody Coal has moved pursuant to Rules 12(b)(6) and Rule 12(f) to dismiss and/or stay and/or strike this Complaint on the grounds that 1) the EEOC failed to conciliate as required by Title VII; 2) the EEOC failed to set forth legal bases warranting the relief it requests; and 3) the EEOC has defined a class in a manner not permitted by Section 706 of the Civil Rights Act of 1964 on which the EEOC relies.

Finally, Delbert Mariano and Thomas Sahu, members of the Hopi Tribe, and the charging parties in the EEOC complaint, have moved pursuant to Rule 24 of the Federal Rules of Civil Procedure to intervene as plaintiffs in this lawsuit.

II. STANDARD OF REVIEW

A motion to dismiss for failure to state a claim for relief under Rule 12(b)(6) must be treated as a motion for summary judgment under Federal Civil Procedure Rule 56 if either party to the motion to dismiss submits materials outside the pleadings in support of or in opposition to the motion that the

Court relies on in its ruling. *Anderson v. Angelone*, 86 F.3d 932, 934 (9th Cir. 1996).

A motion for summary judgment may be granted only if the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). To defeat the motion, the non-moving party must show that there are genuine factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986).

The party opposing summary judgment "may not rest upon the mere allegations or denials of [the party's] pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). The Court views the evidence in the light most favorable to the nonmoving party, Plaintiff here, and draws any reasonable inferences in the nonmoving party's favor. *See Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, 516 U.S. 1171, 134 L. Ed. 2d 209, 116 S. Ct. 1261 (1996).

A case is deemed to have raised a political question not suitable for judicial review if one of the following formulations is inextricable from the case:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent

> resolution without expressing lack of the respect due coordinate branches of government or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 710, 7 L. Ed. 2d 663 (1962) (emphasis added).

III. DISCUSSION

Rule 19 of the Federal Rules of Civil Procedure requires that this Court determine 1) whether an absent party is necessary to the action; and then 2) if the party is necessary but cannot be joined, whether the party is indispensable such that in "equity and good conscience" the suit should be dismissed. *Confederated Tribes v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991).

The EEOC has expressly conceded that the Navajo Nation is a necessary party to this litigation under Rule 19(a) of the Federal Rules of Civil Procedure. *See* Plaintiff's Opposition at page 4, lines 2-3.

The EEOC argues, however, that dismissal is not appropriate because this Court can and should Order that the Navajo Nation be made a party to this litigation. The EEOC specifically asks that this Court "order the Navajo Nation to appear and defend any interests it believes may be affected by this litigation." *See* Plaintiff's Opposition at page 4, lines 24-25. The EEOC further indirectly characterizes this lawsuit as litigation over "the validity of its [the Navajo Nation's] discriminatory lease provision and employment preference provisions ... [and] the interplay between its tribal sovereignty and Title VII." *Id.* at p. 5, lines 18-21. Thus, the initial issue before this Court on Peabody Coal's Motion for Summary Judgment is whether the Navajo Nation can properly be joined as defendant in this lawsuit.

A. The EEOC's Statutory Authority To Sue The Navajo Nation

Peabody Coal does not argue that The Navajo Nation cannot assert sovereign immunity against any lawsuit that might be brought by the EEOC, as representative of the United States.

Instead, Peabody Coal claims that the Court may not join the Navajo Nation because the Commission may not maintain an action "against a government, governmental agency, or political subdivision." *See* 42 U.S.C. § 2000e-5(f)(1); 42 U.S.C. § 2000e-4(g)(6). The first cited statute reads in pertinent part as follows:

> . . . In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court.

42 U.S.C. § 2000e-5(f)(1) (emphasis added). The second cited statute authorizes the EEOC to intervene in actions brought under 2000e-5 against "a respondent other than a government, governmental agency or political subdivision." *See* 42 U.S.C. 2000e-4(g)(6) (emphasis added).

The EEOC does not dispute that the Navajo Nation is a "government, governmental agency, or political subdivision" under these statutes. The EEOC, however, argues that the plain language of this portion of Title VII applies *only* to a "respondent" who is "a government, governmental agency, or political subdivision." It further argues that the Navajo Nation is not a "respondent" under the statutory definition. The referenced statute provides as follows:

> (n) The term "respondent" means an employer, employment agency, labor organization, joint labor-

> management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program or Federal entity subject to section 2000e-16 of this title.

42 U.S.C. 2000e(n). The EEOC argues that the Navajo Nation was not an employer in this case, and thus cannot be considered a "respondent" for purposes of 42 U.S.C. § 2000e-5(f)(1). Thus, the EEOC concludes, 42 U.S.C. § 2000e-5(f)(1) does not limit its power to sue the Navajo Nation.

Another district court, addressing the similar argument that the EEOC had authority to sue a government so long as it did not directly seek relief from the government, soundly rejected it, reasoning:

> In short, the EEOC argues that Congress intended to preclude the EEOC from suing governmental entities for some purposes but not for others. This position is entirely unsupported by the language of the statute, by case law, and by any reasonable policy justification.

EEOC v. AFT Local # 571, 761 F. Supp. 536, 539 (N.D. Ill. 1991) (holding that EEOC's joinder of a school district, a participant in a collective bargaining agreement, as a necessary party under Rule 19 "was frivolous in view of unambiguous statutory and case law authority which prohibited the EEOC from naming [a governmental entity] as a defendant"). The Court quoted another court's reasoning with approval as well:

> It goes too far to argue that EEOC in suing a private party must be able to join indispensable governmental entities or enforcement of the statute will be frustrated. The Attorney General is, after all, part of the federal government also and if he decides to sue a public body he will necessarily have to make the converse decision to join the indispensable private party. The motion to dismiss the Board is granted.

Id. at 540. The same reasoning applies here to reject the EEOC's contention that the statute does not prohibit it from suing the Navajo Nation, a government, because it is not a "respondent" government. The EEOC argument is too strained to support what the statute clearly was not intended to authorize.

The EEOC concedes, moreover, that Indian tribes, including the Navajo Nation, are specifically exempt as employers from the requirements of Title VII, pursuant to 42 U.S.C. § 2000e(b), which provides in pertinent part as follows:

(b) The term "employer" . . . does not include (1) . . . an Indian tribe . . . 42 U.S.C. § 2000e(b). The EEOC concludes from this section, however, that Congress intended to exempt the Navajo Nation from suit *only* when it was an employer, and *not* when it might instead be considered a "government entity."

The EEOC's interpretation of these two statutes together is mistaken, as contrary to their plain meaning. The Attorney General clearly has exclusive authority to file suit whenever a government such as an Indian tribe is involved. *See* 42 U.S.C. § 2000e-5(f)(1); *see also* 42 U.S.C. § 2000e-5(f)(2); 42 U.S.C. § 2000e-8(c) (the Attorney General is to take the appropriate action "in a case *involving* a government, governmental agency, or a political subdivision.") The EEOC cannot expand its authority to bring suit against an Indian tribe, which is clearly exempt from the provisions of Title VII, and is also a "government" specifically exempted from suit by the EEOC, on such a thin argument. No meaningful distinction exists between "respondent" and "defendant" under the circumstances presented here. The EEOC in effect is seeking to sue the Navajo Nation to force it to defend the Navajo Preference in Employment Act and its contracts with employers working on its lands, when it is prohibited from suing the Navajo Nation to enforce Title VII provisions against the tribe directly. This is contrary to the clear

provisions of Title VII prohibiting the EEOC from suing governments, and specifically exempting the Indian tribes from its provisions. *See EEOC v. AFT Local # 571*, 761 F. Supp. at 539.

The EEOC further argues that it has the authority to sue the Navajo Nation pursuant to 42 U.S.C. § 2000e-5(a), which provides in pertinent part as follows:

> The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

42 U.S.C. § 2000e-5(a). The EEOC argues that the statutory definition of "person" specifically includes "governments, governmental agencies, political subdivisions." *See* 42 U.S.C. § 2000e(a). Therefore, the EEOC concludes, "there simply is no basis for Peabody's claim that the Commission cannot litigate this claim when the Navajo Nation is present." *See Plaintiff's Opposition* at page 7. This argument also fails. The EEOC's authority under this section is limited to enforcement of sections 2000e-2 and 2000e-3, which specifically prohibit an "employer," as defined in 2000e(n), from discrimination on the basis of national origin, or retaliation.

The EEOC's reliance on the suggestion in *Dawavendewa v. Salt River Project Agricultural Improvement & Power District*, 276 F.3d 1150, 1162 (9th Cir. 2002) (*Dawavendewa II*) that plaintiff might have a viable alternative forum by virtue of a lawsuit instituted by the EEOC, since "tribal sovereign immunity does not apply in suits brought by the EEOC," is misplaced. *See Dawavendewa II*, 276 F.3d at 1162 (quoting *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1075 (9th Cir. 2001)).[3] This issue was not specifically before

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[3] The EEOC mistakenly cites *Karuk* and *Dawavendewa II* for the proposition that the Ninth Circuit "has twice expressly stated than an Indian tribe is a proper party to litigation brought by the Commission." *See* Opposition at p.4, ll. 7-9. In neither of those

the Court or necessary to its holding, and is therefore dicta. *See id.* Moreover, that Court did not address the issue of whether the EEOC had statutory authority to bring a lawsuit against an Indian tribe, the issue here. *See id.*

This Court is not persuaded that Title VII grants the EEOC authority to sue an Indian tribe when it is not the employer, but is instead a party to Coal Leases executed with the employer that direct it to give preference to Navajos. After all, Title VII expressly exempts Indian tribes from its provisions, and expressly prohibits the EEOC from naming as respondent parties "governments," a term the EEOC does not dispute includes Indian tribes. This Court is persuaded that Congress did not intend to authorize the EEOC to name the Indian tribes as defendants in a lawsuit alleging Title VII violations, no matter what their role. This Court is further persuaded that joinder of an Indian tribe under Rule 19 would divest the EEOC of its authority to litigate. *See EEOC v. AFT, Local # 571*, 761 F. Supp. at 539.

Accordingly, this Court concludes that the joinder of the Navajo Nation, a necessary party under Rule 19(a) of the Federal Rules of Civil Procedure, is not feasible.

B. Whether the Navajo Nation is an Indispensable Party

Thus, this Court must decide whether the Navajo Nation is an indispensable party to this lawsuit such that in "equity and good conscience" the suit should be dismissed. *See Confederated Tribes v. Lujan*, 928 F.2d at 1498; Fed. Civ. Pro. Rule 19(b).

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cases did the Ninth Circuit address the issue of whether the EEOC has statutory authority to sue an Indian tribe under Title VII. In *Karuk*, the Ninth Circuit specifically held that the EEOC did not have regulatory jurisdiction over an Indian tribe under the Age Discrimination in Employment Act, even though the ADEA does not expressly exempt Indian tribes from its jurisdiction, as does Title VII. *See Karuk*, 260 F.3d at 1082.

To make this determination, the Court must balance four factors: 1) the prejudice to any party or to the absent party; 2) whether relief can be shaped to lessen prejudice; 3) whether an adequate remedy, even if not complete, can be awarded without the absent party; and 4) whether there exists an alternative forum. *See Kescoli v. Babbitt*, 101 F.3d 1304, 1310 (9th Cir. 1996).

The Ninth Circuit addressed these factors in *Dawavendewa II*, involving a lease between Salt River Project and the Navajo Nation that contains a Navajo Employment Preference provision similar to the one in the Coal Leases at issue here. *See Dawavendewa II*, 276 F.3d at 1161-63.

With regards to the first factor, prejudice to any party or to the absent party, the Ninth Circuit found in that case that any decision in the absence of the Navajo Nation would prejudice the Navajo Nation's economic interests in the lease, "namely its ability to provide employment and income for the reservation." *See id.* at 1162. The court also found that a decision would "prejudice the Nation's sovereign interests in negotiating contractual obligations and governing the reservation." *See id.* The court also found that the absence of the Nation would prejudice the defendant by preventing the resolution of its lease obligations. *See id.* The same prejudice would occur here with respect to the Navajo Nation and Peabody Coal.

With regards to the second factor, whether relief can be shaped in the Nation's absence to lessen prejudice, the court found that any decision mollifying the plaintiff would prejudice the Nation in its contract with the defendant and its governance of the tribe. *See id.* The same is true here: any relief for the EEOC would come at the expense of the economic and sovereign interests of the Nation.

With regards to whether an adequate remedy could be fashioned absent the Nation, the court found that no partial relief would be adequate, that injunctive relief would

necessarily result in the above-described prejudice to the defendant and the Nation, and an award of damages would not resolve defendant's potential liability to other plaintiffs. *See id.* The same holds true here as well. This factor also warrants dismissal.

The only distinction between the Ninth Circuit's analysis in *Dawavendewa II* and this case with respect to the issue of whether the Navajo Nation is an indispensable party is with regards to the fourth factor, whether there exists an alternative forum. In *Dawavendewa II*, the Ninth Circuit suggested in dicta that the plaintiff "may have a viable alternative forum in which to seek redress" by joining in a lawsuit filed by the EEOC (on the premise the Nation could not assert sovereign immunity against the EEOC), or by suing in tribal court, obtaining an adverse decision, and then bringing suit against the officials in federal court. *See id.* at 1162-63 and n.12. "Recognizing the resources and aggravation consumed in relitigating," however, the court determined that this factor "remains in equipose." *See id.* at 1163. The court noted, moreover, that the absence of any alternative forum to air the grievance was not an impediment to dismissal on grounds an absent party was indispensable. *See id.* at 1162. Here, there may be no alternative judicial forum. This Court, however, finds that this is not an impediment to dismissal.

On balancing these four factors, this Court finds, as did the Ninth Circuit in *Dawavendewa II*, that the Nation is an indispensable party, and that "in equity and good conscience" the lawsuit cannot proceed in its absence. *See id.* at 1163.

Dismissal of this action is therefore proper because the Navajo Nation, a necessary and indispensable party to this litigation, cannot be made a party to this litigation by the EEOC under the specific provisions of Title VII. *See* 42 U.S.C. § 2000e-5(f)(1)(prohibiting the EEOC from filing action against a "government"); 42 U.S.C. § 2000e(b) (exempting Indian tribes from provisions of Title VII); *Dawavendewa II*, 276 F.3d at 1162 (holding that the Navajo

Nation was a necessary and indispensable party to employment discrimination lawsuit involving its leases, and that the lawsuit could not go forward in its absence).

C. Whether this Case Presents a Nonjusticiable Political Question

Even if arguably the EEOC did have statutory authority to sue the Navajo Nation under the circumstances presented here, and its joinder did not divest the EEOC of its authority to litigate, this Court also finds that this case presents a nonjusticiable political question, and it must be dismissed on this alternative ground as well.

The political question doctrine is a "tool for the maintenance of governmental order," and "primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 214, 210, 82 S. Ct. 691, 709, 706, 7 L. Ed. 2d 663 (1962). In deciding whether a case raises a political question that is not suitable for judicial review, the Court fashioned the following test:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217, 82 S. Ct. at 710 (emphasis added). If any one of these "formulations is inextricable from the case at bar," the

case should be dismissed on the ground it presents a nonjusticiable political question. *See id.*; *see also Powell v. McCormack*, 395 U.S. 486, 518-19, 89 S. Ct. 1944, 1962, 23 L. Ed. 2d 491 (1969) (noting that a nonjusticiable political question must involve at least one of these formulations).[4] It is necessary to conduct a "discriminating inquiry into the facts and posture of the particular case" to ascertain whether it presents a nonjusticiable political question. *Baker v. Carr*, 269 U.S. at 217, 82 S. Ct. at 710.

1. The Issues Presented

The EEOC seeks in this action in effect to enjoin enforcement of the Navajo Employment Preference provisions agreed to by the Navajo Nation and Peabody Coal and approved by the Department of the Interior through a representative of the Bureau of Indian Affairs in 1964 Navajo Coal Lease No. 8580 and the 1966 Navajo Coal Lease No. 9910. The EEOC has specifically requested in its Complaint that this Court in part:

> A. Grant a permanent injunction enjoining Peabody, its officers, successors, assigns and all persons in active concert or participation with it, from engaging in discrimination on the basis of national origin.

Complaint, Prayer for Relief at A. In fact, the EEOC has indicated that it intends not only to seek to void or rework the Navajo Nation's Coal Leases, but also to seek to enjoin the Navajo Nation from enforcing its Navajo Preference in Employment Act. *See* Plaintiff's Opposition, at p. 8, lines 4-6, p. 15, n.7. The Navajo Nation Preference in Employment Act directs that "all employers doing business within the territorial jurisdiction ... of the Navajo Nation, or engaged in

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[4] As evidenced by these portions of the Courts' opinions, the EEOC is mistaken in its assertion that the doctrine is not implicated absent a "textually demonstrable constitutional commitment." *See id.*

any contract with the Navajo Nation, shall . . . "give preference in employment to Navajos. . ." 15 NNC § 604. The EEOC suggests, however, that the Navajo Nation is free *only* to require that private company such as Peabody Coal operating on their reservations "adopt hiring preferences for all Native Americans living on or near the reservations," but *not* to adopt hiring preferences applicable to Navajos only. *See id.* at p. 15 n.7. In Plaintiff's Motion to Strike Portions of The Statement of Facts and Affidavits Submitted by Defendant. in fact, the EEOC describes "the central issue in this case" as "whether the Navajo Nation can discriminate against non-Navajo Native Americans." *See* Plaintiff's Motion to Strike, p.2, ll. 19-20. The EEOC suggests, moreover:

> There is nothing in Title VII which says that the Navajo Nations, as a sovereign subordinate to the superior sovereignty of the United States, cannot be enjoined from engaging in actions clearly prohibited by Title VII.

See Plaintiff's Opposition, at page 8, lines 4-6.

This EEOC position on its face appears to be in direct contradiction to the position taken by the United States Department of the Interior through its approval and signature of its authorized representatives on the Coal Leases containing the Navajo Employment Preference provision at issue.

The EEOC concedes in this action that the documents offered by Peabody Coal, specifically the 1961 Navajo Permit, the 1964 Joint Use Permit, the Hopi Lease, and 1964 Navajo Coal Lease No. 8580 and the 1966 Navajo Coal Lease No. 9910, contain the terms outlined. It is therefore undisputed that the permits and leases at issue was approved and signed by a representative of the United States Department of the Interior. It is undisputed that these documents are replete with provisions that require the oversight of the Secretary of the Interior. It is undisputed that

the Secretary of the Interior has specific authority to declare either of these leases "null and void" when in the opinion of the Secretary of the Interior and the Mining Engineer of the Navajo Tribe, "there has been a violation of any of the terms and conditions of the lease." Moreover, it is undisputed that Navajo Coal Lease No. 9910 is specifically entitled: "United States Department of the Interior Bureau of Indian Affairs Mining Lease between Sentry Royalty Company [predecessor in interest to Peabody Coal] and the Navajo Tribe State of Arizona. "Finally, the EEOC has stipulated that the amendments to these Coal Leases "did not change, or address, the hiring preferences outlined in those leases." Thus, it is undisputed that as recently as 1999, the Secretary of the Interior through its authorized representative, approved or signed off on the Navajo Employment Preference provision.

2. The EEOC's Objections

The EEOC in fact has offered no evidence at all to dispute the evidence offered by Peabody Coal. Nor has the EEOC suggested that the testimony offered by Peabody Coal attorneys is false or that these attorneys are somehow wrong in their sworn testimony that it is their understanding that the Secretary of the Interior drafted the initial documents, and routinely requires this type of provision in such leasing agreements.

Instead, the EEOC moves to strike these sworn statements, on the grounds that the attorneys making the statements do not have personal knowledge necessary to make these statements. This Court declines to do so. Attorney Sullivan, senior counsel for Peabody Holding Company, Inc., who serves as primary in-house counsel for Peabody Coal, testified that in that capacity he had "become familiar with numerous documents reflecting the relationship between Sentry Royalty Company ("Sentry") PWCC's [Peabody Coal's] predecessor in interest, and both the Navajo Tribe and the Hopi Tribe." He testified that those documents included the Navajo Coal Lease No. 8580 and Navajo Coal Lease

9910, and the amendments thereto. By virtue of his experience and his review of these documents in his capacity as in-house counsel for Peabody Coal, Attorney Sullivan had the personal knowledge and competency required under the governing law to testify as to his understanding as to the documents' origin, development and meaning. *See, e.g., Barthelemy v. Air Lines Pilots Assoc.*, 897 F.2d 999, 1017 (9th Cir. 1990) (corporate officers' "personal knowledge and competence to testify are reasonably inferred from their positions"); *Federal Sav. & Loan Ins. Corp. v. Griffin*, 935 F.2d 691, 702 (5th Cir. 1991) (corporation's senior attorney could testify to matters in affidavit that the learned through the corporation's business records, even though he did not have "personal knowledge" as to all matters). Former Peabody Coal general counsel Attorney Young testified by affidavit that in his capacity as general counsel and as part of his job duties, he "became familiar with lease agreements that Peabody predecessor, Sentry Royalty Company, entered into with the Navajo Nation for coal mining operations . . . [and] with the terms of coal mining leases that other entities had with the Navajo Nation." Based on his experience and job duties, attorney Young had the personal knowledge and competency required under the governing law to testify as to his understanding that the Secretary of the Interior required the Navajo Employment Preference as a condition of the leases. *See id.*

Even if the Peabody Coal's counsels' statements to which the EEOC objects were stricken, however, this Court finds that the actual Permits and Coal Leases in the undisputed record before this Court provide ample support for the proposition that the Secretary of the Interior, through the Bureau of Indian Affairs, has to this date a policy of requiring or at least approving Navajo Employment Preference provisions in Coal Leases executed by private companies with the Navajo Nation.

The EEOC's position in this lawsuit therefore is in direct contradiction to the position of the Secretary of the Interior.

Any decision by this Court would of necessity require it to make an initial policy choice between the EEOC's enforcement of Title VII and its underlying policies against discrimination and the Secretary of the Interior's policies and practices with regards to Indian tribes. This is the type of case presenting "the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion" that is not appropriate for judicial resolution. *See Baker v. Carr*, 369 U.S. at 217, 82 S. Ct. at 710. Moreover, any decision by this Court would require it to show a lack of respect for one of the two governmental entities: either the EEOC or the Department of the Interior. For this reason also, this case presents a nonjusticiable political question. *See id.* (a political question is presented when it is clear "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due co-ordinate branches of government"). Finally, any decision by this Court is likely to lead to the potential "of embarrassment from multifarious pronouncements by various departments on one question." *See id.* The EEOC and the Department of the Interior, through the Bureau of Indian Affairs, have different interests and opposing views on the issue of the Navajo Employment Preference provision. For all of these reasons, this Court finds that this case presents a nonjusticiable political issue, and it must be dismissed on this alternative ground also. *See id.*

Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment (Doc. # 38) is **GRANTED;**

IT IS FURTHER ORDERED that Plaintiff's Motion to Strike Portions of the Statement of Facts and Affidavits Submitted by Defendant in Support of its Motion for Summary Judgment (Doc. # 43) is **DENIED;**

IT IS FURTHER ORDERED that Defendant's Motion to Strike Plaintiff's Reply in Support of Plaintiff's Motion to Strike as Untimely (Doc. # 49) is **DENIED;**

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss and/or Stay and/or Motion to Strike (Doc. # 24) is **VACATED AS MOOT;**

IT IS FURTHER ORDERED that Delbert Mariano and Thomas Sahu's Motion to Intervene as Plaintiffs (Doc. # 23) is **VACATED AS MOOT.**

IT IS FURTHER ORDERED That Clerk of the Court shall **ENTER JUDGMENT ACCORDINGLY.**

DATED this 24th day of September, 2002.

Mary H. Murguia

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-17305
D.C. No. CV-01-01050 MHM
District of AZ, Phoenix

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff - Appellant,

vs.

PEABODY COAL COMPANY,
Defendant - Appellee.

DELBERT MARIANO; THOMAS SAHU,
Applicants in intervention.

ORDER

Before: HUG, ALARCON, and W. FLETCHER, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Fletcher has voted to deny the petition for rehearing en banc; and Judges Hug and Alarcon so recommend.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc, filed April 22, 2005, are DENIED.